ADDENDUM 1
Volume 5

W2003-00669-CCA-R3-PD

CIRCUIT COURT OF MADISON COUNTY
- TO -
COURT OF CRIMINAL APPEALS

JUDGE ROY B. MORGAN DIVISION I

CIRCUIT COURT CLERK JUDY BARNHILL

VOLUME V OF VIII VOLUMES

STATE OF TENNESSEE

VS.

CASE NO. C-00-422

JON HALL

FELONY	XX	MISDEMEANOR	☐	ROR	☐	TDOC	☒
BOND	☐	$_____		INDIGENT	☐		
POST CONVICTION	XX			HABEAS CORPUS			☐

MR. ALFRED EARLS
ASSISTANCE DISTRICT ATTORNEY
P.O. BOX 2825
JACKSON, TN 38302

Attorney For: APPELLEE

MR. DANNY ELLIS
ATTORNEY AT LAW
P.O. BOX 3512
JACKSON, TN 38303

Attorney For: APPELLANT

Attorney For:

Attorney For:

OFFENSE: FIRST DEGREE MURDER

SENTENCE: DEATH

FILED
JUL 24 2003
Clerk of the Courts
Rec'd By

Vol. 5

Filed this 21ST day of JULY, 2003.

COURT OF CRIMINAL APPEALS

BY: _____

LAYCOOK, JACKSON

INDEX

CERTIFICATE & SEAL 758

STATE'S BRIEF AT THE CLOSE OF EVIDENCE (CONTINUED) 608-757

*156 947 S.W.2d 156

Court of Criminal Appeals of Tennessee, at Knoxville.

Edward Leroy HARRIS, Appellant,
v.
STATE of Tennessee, Appellee.
Feb. 28, 1996.
Permission to Appeal Denied by Supreme Court Feb. 3, 1997.

Defendant was convicted in the Criminal Court, Sevier County, J. Kenneth Porter, J., of murder and sentenced to death, and he appealed. The Supreme Court, Drowota, J., 839 S.W.2d 54, affirmed. The Supreme Court, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746, denied petition for certiorari. Defendant filed petition for postconviction relief. The Criminal Court, Sevier County, J. Kenneth Porter, J., denied petition, and appeal was taken. The Court of Criminal Appeals, Hayes, J., held that counsel's strategic decision not to attempt to suppress exculpatory statements made by defendant to law enforcement officers did not constitute deficient performance.

Affirmed.

Petition for Rehearing

West Headnotes

[1] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
When claim of ineffective assistance of counsel is raised, burden is on defendant to show that counsel's performance was deficient and that counsel's deficient performance prejudiced him. U.S.C.A. Const.Amend. 6.

[2] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
Defendant claiming ineffective assistance of counsel must prove that counsel made errors so serious that counsel was not functioning as counsel guaranteed by Sixth Amendment and that counsel's errors were so serious as to deprive defendant of fair trial, meaning trial whose result is reliable. U.S.C.A. Const.Amend. 6.

[3] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
Defendant must establish both deficient performance and prejudice in order to prevail on ineffective assistance of counsel claim. U.S.C.A. Const.Amend. 6.

[4] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
Court need not consider *Strickland's* deficient performance and prejudice prongs in any particular order, and if defendant fails to establish one prong, court need not consider other prong for purposes of ineffectiveness inquiry. U.S.C.A. Const.Amend. 6.

[5] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
With respect to deficient performance prong of ineffectiveness inquiry, proper measure of attorney performance is reasonableness under prevailing professional norms; attorney's performance must be within range of competence demanded of attorneys in criminal cases. U.S.C.A. Const.Amend. 6.

[6] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
When presented with ineffectiveness claim, court must indulge strong presumption that counsel's conduct falls within wide range of reasonable professional assistance; that is, defendant must overcome presumption that, under circumstances, challenged action might be considered sound trial strategy. U.S.C.A. Const.Amend. 6.

[7] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
For purposes of ineffectiveness inquiry, court should defer to counsel's trial strategy or tactical choices if they are informed ones based upon adequate preparation. U.S.C.A. Const.Amend. 6.

[8] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
When presented with ineffectiveness claim, court

should avoid distorting effects of hindsight and judge reasonableness of counsel's challenged conduct on facts of case, viewed as of time of counsel's conduct. U.S.C.A. Const.Amend. 6.

[9] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
Defendants are not entitled to perfect representation by counsel, only constitutionally adequate representation. U.S.C.A. Const.Amend. 6

[10] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
To establish prejudice, defendant must show that there is reasonable probability that, but for counsel's deficient performance, result of proceeding would have been different, and reasonable probability is one sufficient to undermine confidence in outcome. U.S.C.A. Const.Amend. 6.

[11] Criminal Law ⚖1615
110 ----
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)2 Affidavits and Evidence
110k1615 Degree of Proof.

(Formerly 110k998(17))
In postconviction proceedings, defendant has burden of proving allegations in his petition by preponderance of evidence.

[12] Criminal Law ⚖1158(1)
110 ----
110XXIV Review
110XXIV(O) Questions of Fact and Findings
110k1158 In General
110k1158(1) In General.
Findings of fact and conclusions of law made by trial court after evidentiary hearing are afforded weight of jury verdict, and Court of Criminal Appeals will not set aside judgment of trial court unless evidence contained in record preponderates against its findings.

[13] Criminal Law ⚖1519(17)
110 ----
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1511 Counsel
110k1519 Effectiveness of Counsel
110k1519(17) Other Particular Miscellaneous Issues.

(Formerly 110k998(8))
Postconviction relief petitioner claiming ineffective assistance of counsel could not attribute to counsel situation which he, himself, created. U.S.C.A. Const.Amend. 6; Rules App.Proc., Rule 36(a).

[14] Criminal Law ⚖641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.
Counsel's strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and counsel's strategic choices made after less than complete investigation are reasonable precisely to extent that reasonable professional judgment supports limitations on investigation. U.S.C.A. Const.Amend. 6.

[15] Criminal Law ⚖641.13(6)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(6) Evidence; Procurement, Presentation and Objections.
Counsel has duty to make reasonable investigations or to make reasonable decision that makes particular investigation unnecessary. U.S.C.A. Const.Amend. 6.

[16] Criminal Law ⚖641.13(6)
*156 110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(6) Evidence; Procurement, Presentation and Objections.
In any ineffectiveness case, counsel's decision not to investigate must be directly assessed for reasonableness in all circumstances, applying heavy measure of deference to counsel's judgments. U.S.C.A. Const.Amend. 6.

[17] Criminal Law ⚖641.13(6)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(6) Evidence; Procurement, Presentation and Objections.
Trial counsel's investigation was constitutionally adequate, and counsel made reasonable, strategic decision to forego further investigation and to rely at trial upon cross-examination of state's expert witness, and thus counsel was not ineffective. U.S.C.A. Const.Amend. 6.

[18] Criminal Law ⚖641.13(2.1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused

110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(2.1) In General.

Trial counsel who repeatedly and intently advised defendant of consequences of his refusal to comply with trial court's order to provide additional handwriting exemplars was not ineffective. U.S.C.A. Const.Amend. 6.

[19] Criminal Law ⚿641.13(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(1) In General.

Initially, in considering claims of ineffective assistance of counsel, court addresses not what is prudent or appropriate, but only what is constitutionally compelled. U.S.C.A. Const.Amend. 6.

[20] Criminal Law ⚿641.13(6)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(6) Evidence; Procurement, Presentation and Objections.

Further investigation of background of codefendant was not constitutionally compelled, and thus, counsel was not ineffective for failing to conduct such investigation; counsel did not investigate codefendant's background more thoroughly because codefendant had record from many areas of country. U.S.C.A. Const.Amend. 6.

[21] Criminal Law ⚿641.13(2.1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(2.1) In General.

Trial counsel was not ineffective for failing to request funds for expert to review findings of state's expert in forensic pathology; defendant did not state what, if anything, in state expert's report was erroneous or explain why his findings were suspect, and counsel had examined expert's reports and interviewed expert. U.S.C.A. Const.Amend. 6.

[22] Criminal Law ⚿641.13(6)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(6) Evidence; Procurement, Presentation and Objections.

Any error in defense counsel's failure to contemporaneously object to state's forensic pathology expert's testimony that sharp, sawtoothed markings surrounded victim's wounds did not unduly prejudice defendant, and thus, counsel was not ineffective; counsel vigorously cross-examined state's expert who conceded that he had not compared victim's wounds to any knife involved in investigation. U.S.C.A. Const.Amend. 6.

[23] Criminal Law ⚿641.13(6)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(6) Evidence; Procurement, Presentation and Objections.

Defense counsel's strategic decision not to attempt to suppress exculpatory statements made by defendant to law enforcement officers did not constitute deficient performance; defendant's statements were general denials of participation in killings and were in conformity with defendant's position at trial that he was not present during crime. U.S.C.A. Const.Amend. 6.

[24] Criminal Law ⚿641.13(7)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(7) Post-Trial Procedure and Review.

Strategy of silence during penalty phase of capital murder trial may be adopted by counsel only after reasonable investigation for mitigating evidence or reasonable decision that investigation would be fruitless. U.S.C.A. Const.Amend. 6.

[25] Criminal Law ⚿641.13(7)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(7) Post-Trial Procedure and Review.

Extent of counsel's required investigation during penalty phase of capital trial depends upon information supplied by defendant for purposes of ineffectiveness inquiry. U.S.C.A. Const.Amend. 6.

[26] Criminal Law ⚿641.13(2.1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(2.1) In General.

[See headnote text below]

[26] Criminal Law ⚿641.13(6)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in

General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(6) Evidence; Procurement, Presentation and Objections.

When facts that support certain line of defense are generally known to counsel because of what defendant has said, need for further investigation may be considerably diminished or eliminated altogether, and when defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or harmful, counsel's failure to pursue those investigations may not be later challenged as unreasonable. U.S.C.A. Const.Amend. 6.

[27] Criminal Law ⚖641.13(7)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(7) Post-Trial Procedure and Review.

Under certain circumstances, trial counsel's decision not to investigate defendant's family childhood background, for purposes of penalty phase of capital murder trial, may legitimately be product of reasoned tactical choice. U.S.C.A. Const.Amend. 6.

[28] Criminal Law ⚖641.13(7)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k641 Counsel for Accused
110k641.13 Adequacy of Representation
110k641.13(2) Particular Cases and Problems
110k641.13(7) Post-Trial Procedure and Review.

Performance of defense counsel, who allegedly failed to adequately investigate and obtain available evidence regarding defendant's background and mental condition, was constitutionally adequate at penalty phase of capital murder trial, and defendant suffered no prejudice as result of counsel's performance. U.S.C.A. Const.Amend. 6.

[29] Criminal Law ⚖1669
110 ----
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1669 Costs; Transcripts.

(Formerly 110k998(16), 110k998(14.1))

At hearing, postconviction petitioner ***156** must demonstrate by specific factual proof that services of expert or investigator are necessary to establish ground for postconviction relief and that he is unable to establish that ground by other available evidence.

[30] Costs ⚖302.2(2)
102 ----
102XIV In Criminal Prosecutions
102k301.1 Security for Payment; Proceedings in Forma Pauperis
102k302.2 Production of Witnesses or Evidence
102k302.2(2) Expert Witnesses or Assistance in General.

[See headnote text below]

[30] Costs ⚖302.3
102 ----
102XIV In Criminal Prosecutions
102k301.1 Security for Payment; Proceedings in Forma Pauperis
102k302.3 Investigative Assistance.

Trial court should grant motion for support services if postconviction relief petitioner demonstrates that investigative or expert services are necessary to ensure protection of his constitutional rights; in other words, within postconviction context, support services sought must implicate constitutional right.

[31] Judges ⚖51(4)
227 ----
227IV Disqualification to Act
227k51 Objections to Judge, and Proceedings Thereon
227k51(4) Determination of Objections.

Motion to recuse judge is addressed to sound discretion of trial court.

[32] Judges ⚖49(1)
227 ----
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) In General.

Generally, when trial judge has no doubt of his ability to preside fairly over matters presented, there is no need to grant motion for recusal.

[33] Judges ⚖49(1)
227 ----
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) In General.

Standard for recusal of judge is ultimately objective one, and thus, recusal is warranted when person of ordinary prudence in judge's position, knowing all facts known to judge, would find reasonable basis for questioning judge's impartiality.

[34] Criminal Law ⚖1148
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1148 Preliminary Proceedings.

Standard of review on appeal is whether trial court abused its discretion by denying recusal motion.

[35] Judges ⚖49(1)
227 ----
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) In General.

Prior knowledge of facts about case is not sufficient in and of itself to require disqualification of judge.

[36] Judges ⚖47(2)
227 ----
227IV Disqualification to Act
227k47 Acting as Counsel or Other Participation in Cause
227k47(2) Presiding at Former Trial Relating to Same or Similar Matter.

Judge is in no way disqualified merely because he has participated in other legal proceedings against same person.

[37] Judges ⚖49(1)
227 ----
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) In General.
To disqualify judge, prejudice must stem from extrajudicial source and result in opinion on merits on some basis other than what judge learned from participation in case.

[38] Judges ⚖47(2)
227 ----
227IV Disqualification to Act
227k47 Acting as Counsel or Other Participation in Cause
227k47(2) Presiding at Former Trial Relating to Same or Similar Matter.
Judge who presided at trial in which conviction occurred is permitted, although not required, to preside over postconviction proceedings when competency of trial counsel has been challenged by defendant. West's Tenn.Code, § 40-30-103 (1994).

[39] Witnesses ⚖68
410 ----
410II Competency
410II(A) Capacity and Qualifications in General
410k68 Judges, Jurors, and Officers Acting at Trial, as Witnesses.
Trial judge cannot both preside at postconviction proceeding and serve as witness in that proceeding. Rules of Evid., Rule 605.

[40] Judges ⚖49(1)
227 ----
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) In General.
Adverse rulings by judge are not usually sufficient grounds to establish bias so as to warrant judge's recusal.

[41] Criminal Law ⚖1134(3)
110 ----
110XXIV Review
110XXIV(L) Scope of Review in General
110k1134 Scope and Extent in General
110k1134(3) Questions Considered in General.
Issue to be determined on appeal of motion for recusal is not propriety of judicial conduct of judge, but whether he committed error which resulted in unjust disposition.

[42] Constitutional Law ⚖268(8)
92 ----
92XII Due Process of Law
92k256 Criminal Prosecutions
92k268 Trial
92k268(2) Particular Cases and Problems
92k268(8) Qualifications, Actions, and Comments of Judge, Jury, or Prosecutor.

[See headnote text below]

[42] Judges ⚖49(1)
227 ----
227IV Disqualification to Act
227k49 Bias and Prejudice
227k49(1) In General.
Trial judge's remarks and actions at postconviction hearing, albeit on occasion ill-advised, did not diminish overall fairness of proceeding, even applying heightened standard of due process applicable in capital murder case, and thus, recusal of judge was not warranted. U.S.C.A. Const.Amend. 14.

[43] Criminal Law ⚖586
110 ----
110XIX Continuance
110k586 Discretion of Court.
Whether to grant continuance rests within discretion of trial court.

[44] Criminal Law ⚖1151
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1151 Continuance.

[See headnote text below]

[44] Criminal Law ⚖1166(7)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166 Preliminary Proceedings
110k1166(7) Time for Trial or Hearing; Continuance.
Denial of continuance will not be disturbed unless it appears upon face of record that trial judge abused his discretion and prejudice enured to defendant as result of trial judge's ruling.

[45] Criminal Law ⚖1499
110 ----
110XXX Post-Conviction Relief
110XXX(B) Grounds for Relief
110k1499 Continuance.

(Formerly 110k998(6.1))
To trigger postconviction relief, denial of continuance must implicate constitutional right.

[46] Habeas Corpus ⚖479
197 ----
197II Grounds for Relief: Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k479 Time for Trial; Continuance.
Habeas petitioner must demonstrate that trial court abused its discretion in denying continuance and that its action rendered proceeding fundamentally unfair.

[47] Criminal Law ⚖578
110 ----
110XIX Continuance
110k578 Power and Duty of Court as to Continuance.
Grant or refusal of continuance rarely reaches constitutional proportions.

[48] Criminal Law ⚖1650
110 ----
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1650 In General.

(Formerly 110k998(18))
Petitioner was not entitled to continuance of postconviction evidentiary hearing on ground that he had not completed investigation of his claims; petitioner failed to identify any prejudice affecting his conviction or sentence, and he sought continuance in order to gather information which, at time of continuance motion, was largely unknown and of entirely speculative value.

[49] Constitutional Law ⚖270.5
92 ----
92XII Due Process of Law
92k256 Criminal Prosecutions
92k270.5 Post-Conviction Proceedings.

[See headnote text below]

[49] Criminal Law ⚖1650
110 ----
110XXX Post-Conviction Relief
110XXX(C) Proceedings
110XXX(C)3 Hearing and Determination
110k1650 In General.

(Formerly 110k998(18))
Postconviction court's denial of petitioner's motion for continuance did not implicate his due process rights. U.S.C.A. Const.Amend. ***156** 14.

[50] Criminal Law ⚖1433(2)
110 ----
110XXX Post-Conviction Relief
110XXX(A) In General
110k1433 Matters Already Adjudicated
110k1433(2) Affirmance of Conviction.

(Formerly 110k998(13))
Issues that have been previously determined on direct appeal cannot support petition for postconviction relief. West's Tenn.Code, § § 40-30-111, 40-30-112 (1990).

[51] Criminal Law ⚖627.5(3)
110 ----
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.5(3) Prosecution's Right to Disclosure.
Defense counsel would not have been required to disclose to state any unfavorable opinion by expert whom he did not intend to call at trial or whose report he did not intend to introduce at trial. Rules Crim.Proc., Rule 16(b)(1)(B), (b)(2).

[52] Criminal Law ⚖1119(1)
110 ----
110XXIV Review
110XXIV(G) Record and Proceedings Not in Record
110XXIV(G)15 Questions Presented for Review
110k1113 Questions Presented for Review
110k1119 Conduct of Trial in General
110k1119(1) In General.
In evaluating possible prejudice to defendant for purposes of ineffectiveness inquiry, Court of Criminal Appeals' review was limited to those mitigating factors reflected in record of capital murder trial. U.S.C.A. Const.Amend. 6.

[53] Sentencing and Punishment ⚖1757
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1757 Evidence in Mitigation in General.

(Formerly 110k1208.1(5))
It is neither Court of Criminal Appeals' right nor prerogative to impose any limitation on mitigating evidence that might be considered by jury in capital case.

***160** Paul J. Morrow and Brock Mehler, Nashville, for Appellant.

Charles W. Burson, Attorney General and Reporter, Christian S. Chevalier, Assistant Attorney General, Criminal Justice Division, Nashville, Al C. Schmutzer, Jr., District Attorney ***161** General, Richard Vance, Asst. District Attorney General, Sevierville, for Appellee.

OPINION

HAYES, Judge.

The appellant, Edward Leroy Harris, alias "Tattoo Eddie," seeks post-conviction relief from his convictions of one count of armed robbery and two counts of premeditated first degree murder, entered by the Circuit Court of Sevier County in May, 1988, and the consequent imposition of one sentence of life imprisonment and two sentences of death by electrocution. The convictions and sentences were affirmed on appeal by the Tennessee Supreme Court. *State v. Harris*, 839 S.W.2d 54 (Tenn.1992), *cert. denied*, 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993).

On August 10, 1993, the appellant filed a petition for post-conviction relief. On November 29, 1993, the post-conviction court conducted a hearing on the merits of the appellant's petition. At the conclusion of the hearing, the post-conviction court denied the petition. A written judgment of dismissal was filed on December 6, 1993.

The appellant raises the following eight issues on appeal:

(1) Whether the appellant received the effective assistance of counsel at trial and on appeal;

(2) Whether the post-conviction court erred by denying the appellant's motion for an *ex parte* hearing and support services;

(3) Whether the post-conviction court abused its discretion in denying the appellant's motion to recuse;

(4) Whether the post-conviction court abused its discretion in denying the appellant's motion for a continuance;

(5) Whether the evidence presented at trial was sufficient to establish the elements of premeditation and deliberation and whether the instructions to the jury on premeditation and deliberation misled the jury;

(6) Whether the use of the felony murder aggravating circumstance violated the holding in *State v. Middlebrooks;*

(7) Whether the jury was prevented from considering lesser included offenses by the use of a sequential jury instruction; and

(8) Whether Tennessee's death penalty statute is constitutional.

After reviewing the record, we affirm the judgment of the post-conviction court.

BACKGROUND FACTS

The appellant was convicted of the September 13, 1986, murders of two employees of the Rocky Top Village Inn in Gatlinburg. Also charged in the murders were Kimberly Pelley, the appellant's girlfriend; Joseph DeModica, a Georgia state penitentiary acquaintance of the appellant; and transvestite, Rufus Doby, also known as Ashley Silvers. At trial, two key sources of evidence for the State were the testimony of the co-defendant, DeModica, which implicated the appellant in the murders, and a letter describing the murders, recovered in a phone booth near the police station in Maggie Valley, North Carolina.

At trial, Joseph DeModica testified that, on the day of the murders, he, Doby, Pelley, and the appellant drove to Gatlinburg. Following a visit to the Great Smoky Mountains National Park, the group drove to the Rocky Top Village Inn. DeModica observed the appellant, Pelley, and one of the victims, Melissa Hill, enter the motel room in which Hill's body was subsequently discovered. Pelley carried a knife in her hand. DeModica remained in the parking lot. He heard several screams. A security guard, Troy Valentine, arrived, but encountered the appellant, who had come out of the motel room. Valentine and the appellant began to fight. Pelley also came out of the motel room, took the guard's flashlight, and struck him over the head with it. The appellant and Pelley then dragged Valentine into the motel room. DeModica heard two gunshots. He testified that, when the appellant and Pelley again came out of the motel room, they looked as if someone had sprayed them with red paint.

The State presented evidence to corroborate various aspects of DeModica's testimony. For example, with respect to the knife *162 that DeModica observed in Pelley's hand, an acquaintance testified that the appellant carried a lock-blade knife and a hunting knife with a serrated edge. Moreover, each victim suffered a deep neck wound from a serrated knife. Each victim had also been shot in the head. The massive amount of blood at the crime scene and the number of injuries inflicted upon each victim were consistent with DeModica's description of the appellant and Pelley following the murders. Finally, DeModica knew that Valentine had been clubbed with his flashlight. This information was not released to the media and would have been known only to the killers.

The Maggie Valley letter, which was found three days after the murders, also contained information which only the killers would have known. The State's document examiner excluded DeModica, Pelley, and Silvers as the writer of the letter. Expert testimony further established strong indications that the appellant wrote this letter. A former girlfriend of the appellant, Antonia Jones, identified the handwriting in the Maggie Valley letter as being that of the appellant.

Following his arrest, the appellant made a series of statements to Tennessee Bureau of Investigation agents and Georgia law enforcement officers. Initially, the appellant denied going to Gatlinburg. However, he subsequently stated that he and his companions had eaten in a restaurant in Pigeon Forge, and that, while he and Pelley were in Gatlinburg with DeModica and Silvers, he had purchased a chain for Pelley. He denied participating in the killings and implied that DeModica and Silvers were the murderers.

The appellant did not testify at the guilt phase of his trial. Essentially, his defense, as advanced through the appellant's statements to the police following his arrest, was a denial of any participation in the crime. However, reviewing the sufficiency of the evidence on direct appeal, the supreme court remarked that "the overwhelming evidence supported the verdict of the jury...." *Harris,* 839 S.W.2d at 76. Similarly, the post-conviction court observed, "And the proof came in. The proof continued to come in.... This evidence as it rolled in, was overwhelming."

At the penalty phase of the trial, the State introduced the appellant's prior convictions involving violence to the person and otherwise relied upon the proof introduced during the guilt phase. (FN1) Defense counsel initially indicated that they would offer no proof during the penalty phase. However, following a conference with the trial judge in chambers, the appellant testified on his own behalf. The appellant stated that he was 32 years old and grew up in North Carolina. He informed the jury that he had only completed the third grade in school and could neither read nor write. He admitted that his difficulties in school stemmed largely from a lack of motivation. The appellant further testified that, during his youth, his relationship with his parents was troubled, and that he left home at the age of 14. The appellant admitted that, when he was 18, he pled guilty to several offenses in Georgia and spent 10 years in the Georgia penitentiary. While at the penitentiary, the appellant became involved in the Golden Gloves boxing program and won several trophies. The appellant testified that he has two children by a prior marriage, whom he visited on occasion. In conclusion, he asked that the jury spare his life.

The jury imposed the punishment of death, finding that three aggravating circumstances, Tenn.Code Ann. § 39-2-203(i)(2), (5), and (7) (1982), (FN2) outweigh any mitigating circumstances.

**163 INEFFECTIVE ASSISTANCE OF COUNSEL*

[1][2][3][4] When a claim of ineffective assistance of counsel is raised, the burden is upon the appellant to show (1) that counsel's performance was deficient and (2) that the deficient performance prejudiced the defense. *Strickland v. Washington,* 466 U.S. 668, 687, 104 S.Ct. 2052, 2064, 80 L.Ed.2d 674 (1984). Thus, the appellant must prove that counsel "made

errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment," *and* the appellant must demonstrate that counsel's errors "were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* The appellant must establish *both* deficient performance *and* prejudice in order to prevail. *Id.* A reviewing court need not consider the two prongs of *Strickland* in any particular order. *Id.* at 697, 104 S.Ct. at 2069. Moreover, if the appellant fails to establish one prong, a reviewing court need not consider the other. *Id.*

[5][6][7][8][9] With respect to deficient performance, the proper measure of attorney performance is reasonableness under prevailing professional norms. *Id.* at 688, 104 S.Ct. at 2065. In other words, the attorney's performance must be within the range of competence demanded of attorneys in criminal cases. *Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975); *Wright v. State,* No. 01C01-9105-CR-00149, 1994 WL 115955 (Tenn.Crim.App. at Nashville), *perm. to appeal denied,* (Tenn.1994), *cert. denied,* 513 U.S. 1163, 115 S.Ct. 1129, 130 L.Ed.2d 1091 (1995). This court "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' " *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. We should defer to trial strategy or tactical choices if they are informed ones based upon adequate preparation. *Wright,* No. 01C01-9105-CR-00149 (citing *Hellard v. State,* 629 S.W.2d 4, 9 (Tenn.1982)). Additionally, this court should avoid the "distorting effects of hindsight" and "judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." *Strickland,* 466 U.S. at 689-690, 104 S.Ct. at 2065-2066. Finally, we note that defendants are not entitled to perfect representation, only constitutionally adequate representation. *Harries v. State,* No. 833, 1990 WL 125023 (Tenn.Crim.App. at Knoxville, August 29, 1990), *perm. to appeal denied,* (Tenn.1991).

[10] In order to establish prejudice, the appellant must show that there is a reasonable probability that, but for counsel's deficient performance, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. A reasonable probability is one sufficient to undermine confidence in the outcome. *Id.*

At the conclusion of the hearing in this case, the post-conviction court entered the following findings of fact:

(1) Mr. Sexton, Mr. Goddard, and Mr. Strand (appointed appellate counsel) had supporting staff and resources, including the Capital Case Resource Center, to utilize in the preparation for trial and the anticipated appeal.

(2) Defense counsel utilized every advantage available to them under the law and the facts as they found them. Defense counsel investigated every fact related to them by the petitioner, pursued every lead and prepared as best as they were enabled by the defendant.

(3) The defendant/petitioner did not at any time furnish information to defense counsel that would have justified seeking special support services, and they were diligent in not pursuing a mental investigation.

(4) Defense counsel did all they could to prevent the introduction of incriminating evidence and to discredit it to the extent they could when it was introduced over timely objection.

In denying the appellant's petition, the post-conviction court described counsel's trial performance in the following manner: "... [W]ell tried. Ably tried. Diligently tried. Conscientiously tried...."

***164** [11][12] In post-conviction proceedings, the appellant has the burden of proving the allegations in his petition by a preponderance of the evidence. *McBee v. State,* 655 S.W.2d 191, 195 (Tenn.Crim.App.1983). *See also State v. Buford,* 666 S.W.2d 473, 475 (Tenn.Crim.App.1983), *perm. to appeal denied,* (Tenn.1984). Moreover, "[t]he findings of fact and conclusions of law made by the trial court after an evidentiary hearing are afforded the weight of a jury verdict; this court will not set aside the judgment of the trial court unless the evidence contained in the record preponderates against its findings." *State v. Dick,* 872 S.W.2d 938, 943 (Tenn.Crim.App.), *perm. to appeal denied,* (Tenn.1993); *see also Harries,* No. 833. The appellant contends that the evidence preponderates against the judgment entered by the post-conviction court that the appellant was afforded effective assistance of counsel.

At the post-conviction hearing, the appellant called Charles Sexton, one of the appellant's trial attorneys. Sexton was appointed to represent the appellant immediately following the appellant's arraignment in December, 1987. (FN3) Sexton has been licensed to practice law in this state since 1979. At the time of his appointment, he was serving as the attorney for a local indigent defender program created by private act for Sevier County. Additionally, Sexton remained active in the private practice of law as a partner in a local law firm. He had an extensive criminal trial practice, and, in 1987, was averaging twenty to twenty-five felony cases each term of court. Before his appointment to this case, Sexton had represented ten or more defendants charged with some degree of homicide, including several charged with capital first degree murder. (FN4) Shortly after the appointment of Sexton to represent the appellant, the State announced its intention to seek the death penalty, and the trial court appointed William Goddard as co-counsel. The record reflects that Goddard was an experienced trial lawyer in both the civil and criminal areas of the law. (FN5) Both Sexton and Goddard utilized various members of their respective law firms, primarily in the area of legal research, throughout the course of the appellant's trial.

I. Guilt Phase

Sexton testified at the post-conviction hearing that, in preparation for the guilt phase of the trial, he visited the crime scene, interviewed potential

witnesses, and obtained and reviewed discovery information concerning handwriting exemplars and autopsy reports. Additionally, proof at the hearing established that trial counsel conducted pre-trial interviews with all of the State's material witnesses on at least one occasion. Finally, Sexton testified that he spent a great deal of time on the case, and that, between January and May of 1988, "there were very few days that went by that at least some portion of the day wasn't spent dealing with some issue on the case." Benjamin Strand, Goddard's former law partner, who assisted in the appeal after Goddard's death, testified that Goddard also spent a great deal of time on the appellant's case and, in fact, devoted the two weeks prior to trial exclusively to trial preparation.

Nevertheless, the appellant argues that trial counsel's performance at the guilt phase of the trial was not within the range of competence demanded of attorneys. Specifically, he contends that defense counsel failed to reasonably investigate the authorship of the Maggie Valley note and failed to properly advise the appellant of the consequences of his refusal to provide additional handwriting exemplars. Moreover, the appellant asserts that counsel failed to adequately investigate the co-defendant DeModica's background and the autopsy and crime scene evidence. Finally, he contends that defense counsel's performance was deficient in that counsel failed to object to Dr. Blake's testimony concerning ***165** the victims' wounds and failed to move to suppress the appellant's statements to the police. (FN6) We conclude that the appellant has failed to carry his burden of proof, and that the evidence in the record preponderates in favor of the post-conviction court's judgment.

[13] With respect to counsel's investigation of the Maggie Valley letter, we initially note that the appellant was afforded, at the trial level, the opportunity to exonerate himself as the author of the Maggie Valley letter, which opportunity he rejected. Indeed, the Tennessee Supreme Court, on direct appeal, observed:

> It is clear from the record that from at least late February 1988, three months before trial, the defendant knew that the State was seeking handwriting samples and was consulting an expert. The Defendant was aware of ... the significance of the handwriting issue. When the court ordered additional samples, the Defendant refused to comply.

Harris, 839 S.W.2d at 67. Thus, the appellant cannot now attribute to counsel's performance a situation which he, himself, created. Tenn.R.App.P. 36(a); *see also Waterhouse v. Perry,* 195 Tenn. 458, 260 S.W.2d 176, 178 (1953).

[14][15][16][17] Moreover, the record reveals that counsel's investigation was constitutionally adequate. Prior to trial in this case, defense counsel contacted a handwriting expert, James Kelly, an agent with the Georgia Bureau of Investigation, and filed a motion for a certificate of need for Kelly. However, the information that they obtained from Kelly was ultimately no more conclusive than the opinion of the State's expert, Thomas Vastrick, a document examiner with the United States Postal Service. The record reflects that defense counsel reviewed Vastrick's reports, and that Goddard interviewed Vastrick on at least one occasion. With respect to Vastrick's opinion, Sexton testified that defense counsel "felt very comfortable in what Mr. Vastrick's position was. That he couldn't say that Mr. Harris was the author of that note." Faced with two inconclusive opinions, counsel could reasonably determine that the possibility of obtaining a favorable expert opinion was outweighed by the risk that counsel would merely provide the State an adverse expert opinion. *See Dees v. Caspiri,* 904 F.2d 452, 455 (8th Cir.), *cert. denied,* 498 U.S. 970, 111 S.Ct. 436, 112 L.Ed.2d 419 (1990).

> [S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.

Burger v. Kemp, 483 U.S. 776, 794, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987). Defense counsel made a reasonable strategic decision to forgo further investigation and rely at trial upon the cross-examination of the State's expert witness.

Unfortunately, defense counsel was informed only a few days prior to trial of another witness, Antonia Jones, who was familiar with the appellant's handwriting. When, on the first day of trial, defense counsel learned that both Antonia Jones and Vastrick were to testify, counsel requested an opportunity to have an independent expert examine the Maggie Valley letter and the appellant's handwriting. The trial court denied the request, holding that the request came too late. In any event, defense counsel vigorously cross-examined Jones. Moreover, counsel was able to locate and interview Jones' mother, Julia Jones. Mrs. Jones testified for the defense in an attempt to discredit her daughter's testimony. Based upon the foregoing, we cannot conclude that counsel's performance was deficient.

***166** [18] The appellant also claims that counsel failed to properly advise him of the consequences of his refusal to comply with the trial court's order to provide additional handwriting exemplars. This issue, the appellant contends, is significant in view of the trial court's ruling that his refusal could be considered by the jury as an inference of guilt. However, the post-conviction court found that the appellant was advised of the consequences of his refusal "repeatedly, and intently." The record supports the finding of the post-conviction court. At the post-conviction hearing, Sexton was asked whether he recalled informing the appellant of the inferences that could be drawn at trial from the appellant's failure to submit additional samples. Trial counsel responded, "I believe we talked about it at the bench on the 11th. I believe that it was probably talked about at the hearing in Dandridge.... We talked with Mr. Harris about it. And I know it

was brought up on this occasion. And I believe probably at one or two other occasions in the proceedings." This contention is without merit.

[19][20] The appellant next complains that defense counsel failed to reasonably investigate the background of co-defendant, Joe DeModica. Counsel testified at the post-conviction hearing that he examined DeModica's criminal record. The appellant contends that defense counsel should have further investigated DeModica's past in order to determine whether DeModica has a propensity for violence. The appellant argues that such information would have rebutted DeModica's claim that he was afraid of the appellant and was "forced" to remain with the appellant throughout this criminal episode. Sexton testified at the post-conviction hearing that he did not investigate DeModica's background more thoroughly "because Mr. Demodica had been around many parts of the country, and had lived in many areas, and had a record from many areas of this country." Nevertheless, the appellant asserts that defense counsel should have requested funds for an investigator. Initially, "in considering claims of ineffective assistance of counsel, '[w]e address not what is prudent or appropriate, but only what is constitutionally compelled.' " *Burger,* 483 U.S. at 794, 107 S.Ct. at 3126 (citation omitted). Moreover, there is nothing in the record that would have triggered further investigation by defense counsel of DeModica's background. (FN7) Thus, we cannot conclude that further investigation was constitutionally compelled.

[21] The appellant contends that counsel was ineffective for failing to request funds for an expert to review the findings of Dr. Blake, the State's expert in forensic pathology. However, the appellant does not state what, if anything, in Dr. Blake's report is erroneous or explain why his findings are suspect. The record reflects that, prior to trial, defense counsel examined Dr. Blake's reports and interviewed Dr. Blake. Again, we cannot conclude that counsel's performance was deficient.

[22] The appellant also claims that counsel erroneously failed to object to Dr. Blake's testimony at trial that two of the victims' wounds had "serrated margins." The record reveals that defense counsel did, in fact, object to the introduction of Dr. Blake's testimony, citing the State's failure to comply with discovery rules. Prior to trial, defense counsel had repeatedly requested any additional reports by Dr. Blake, yet no additional reports were furnished until trial. At trial, the State delivered to defense counsel for the first time a report by Dr. Blake, describing Dr. Blake's observations at the crime scene. The trial judge overruled defense counsel's objection to Dr. Blake's testimony, concluding that Dr. Blake was an ordinary witness with respect to the matters contained in the report. However, the judge invited the defense to renew their objection if Dr. Blake's testimony touched on an area of expertise of which the defense had not received notice. At trial, Dr. Blake did, in fact, testify concerning wound analysis, conducted only a few days prior to trial, and the "sharp, sawtoothed markings" surrounding two of the wounds. The defense failed to make a contemporaneous *167 objection. However, counsel vigorously cross-examined Dr. Blake, who conceded that he had not compared the victim's wounds to any knife involved in the investigation. Thus, even if defense counsel's failure to contemporaneously object constituted deficient performance, we conclude that such error did not unduly prejudice the defense.

[23] Finally, the appellant complains that counsel did not attempt to suppress statements made by the appellant to law enforcement officers. However, the record reveals that the statements were not inculpatory, but rather exculpatory. The statements were general denials of participation in the killings and were in conformity with the appellant's position at trial that he was not present during the criminal episode. Counsel testified at the post-conviction hearing that, at the time of trial, he "didn't feel [that the statements] would become relevant ... but if they did, [h]e didn't mind ... the exculpat[ory] part getting in." The appellant has not demonstrated that this strategic decision of counsel was deficient performance.

We conclude that the appellant has failed to establish his allegations of ineffective assistance of counsel at the guilt phase of the trial by a preponderance of the evidence.

II. Penalty Phase

The appellant also contends that he was afforded ineffective assistance of counsel at the sentencing phase of the trial. Again, in imposing two death penalties, the jury found that the appellant had previously been convicted of one or more felonies involving the use or threat of violence to the person, that the murders were especially heinous, atrocious, or cruel, and that the murders were committed while the appellant was engaged in a robbery. Tenn.Code Ann. § 39-2-203(i)(2), (5), and (7). The jury further found that these aggravating circumstances outweigh any mitigating factors. The appellant argues that defense counsel failed to adequately prepare for the sentencing phase of the trial. Specifically, the appellant asserts that counsel failed to adequately investigate and obtain available evidence regarding the appellant's background and mental condition. (FN8)

[24][25][26] At the penalty phase, defense counsel offered no proof, other than the appellant's testimony, in support of mitigation. Our supreme court has observed that there is no legal requirement and no established practice that the accused must offer evidence at the penalty phase of a capital trial. *State v. Melson,* 772 S.W.2d 417, 421 (Tenn.), *cert. denied,* 493 U.S. 874, 110 S.Ct. 211, 107 L.Ed.2d 164 (1989). However, "[a] strategy of silence may be adopted only after a reasonable investigation for mitigating evidence or a reasonable decision that an investigation would be fruitless." *Tafero v. Wainwright,* 796 F.2d 1314, 1320 (11th Cir.1986), *cert. denied,* 483 U.S. 1033, 107 S.Ct. 3277, 97 L.Ed.2d 782 (1987). Courts have held counsel's representation beneath professionally competent standards when sentencing counsel did not conduct enough investigation to formulate an "accurate life profile" of a defendant. *Jackson v. Herring,* 42 F.3d 1350, 1367 (11th Cir.), *cert. dismissed,* 515 U.S. 1189, 116 S.Ct. 38, 132 L.Ed.2d 919 (1995). We note that the extent of investigation required depends critically upon information supplied by the

defendant. *Burger,* 483 U.S. at 795, 107 S.Ct. at 3126. *See also Whitmore v. Lockhart,* 8 F.3d 614, 621 (8th Cir.1993).

> [W]hen the facts that support a certain line of defense are generally known to counsel because of what the defendant has said, the need for further investigation may be considerably diminished or eliminated altogether. And when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.
>
> *Burger,* 483 U.S. at 795, 107 S.Ct. at 3126.

In this case, defense counsel did not act "in a factual void in an unjustified manner." *Knighton v. Maggio,* 740 F.2d 1344, 1350 (5th ***168** Cir.), *cert. denied,* 469 U.S. 924, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984). With respect to the appellant's background, Sexton testified at the post-conviction hearing that he spoke with the appellant "many, many times." Moreover, during an early interview, Sexton utilized a standardized eight to ten page form to gather background information from the appellant. Trial counsel acknowledged that he was familiar with the appellant's limited educational background and the fact that he had resided in institutions in North Carolina as a juvenile and in penal institutions as an adult. Sexton testified that the appellant was "able to outline where he had been and ... why he was there." Sexton also contacted the appellant's mother in Georgia on two occasions. Defense counsel asked the appellant's mother to testify at the sentencing hearing. She refused to participate.

Sexton attempted to contact other individuals whose names were supplied by his client, but to no avail as they could not be found. Sexton testified at the post-conviction hearing that "it was hard to find somebody that would take an interest in this man, and would make an effort to come up here and ... and show some concern for him. And it got down to the point where it looked like it was just me and Bill Goddard, and nobody else was going to give a hoot about what happened to this man."

Thus, the appellant and his mother were the primary sources of background information relevant to the sentencing phase of the appellant's trial. Sexton indicated that the information obtained from the appellant and his mother suggested that further investigation would be unproductive. Sexton stated that if he "had thought anything would have helped this man, [he] would have had it [at the sentencing hearing]."

[27] Sexton admitted that defense counsel did not request funds for investigative services. However, "[u]nder certain circumstances, trial counsel's decision not to investigate family childhood background may legitimately be the product of a reasoned tactical choice. Given the particular circumstances of [a] case including, among other things, the fact that [a defendant] [is] thirty-one years old when he murder[s] [the victim], evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight." *Francis v. Dugger,* 908 F.2d 696, 703 (11th Cir.1990), *cert. denied,* 500 U.S. 910, 111 S.Ct. 1696, 114 L.Ed.2d 90 (1991). The appellant in this case was approximately thirty years of age at the time of the murders.

With respect to the appellant's mental health, Sexton testified that he and Goddard discussed the possibility of requesting a psychological evaluation of the appellant, but concluded that there was no evidence that any such evaluation was warranted. At the post-conviction hearing, Sexton testified:

> But at no point in time, during this proceeding did I ever feel like Mr. Harris was less than competent. He always communicated with us. He was always very cooperative with us. He always talked very freely with us. Was able to understand the questions when we would ask them, was able to give us answers. And, frankly, was ... was as cooperative as you could ask him to be. In most areas. Now there were some things we had some difficulties with. But as far as him understanding, and having any mental deficiencies, I was never ... it really never became an issue ... with me. (FN9)

We note that the post-conviction court also observed, "This court has noticed nothing to indicate anything to raise a question about this defendant's ability to understand these proceedings and defend himself, participate in them." Finally, trial counsel testified that at no time during any pre-trial interview did the appellant mention a learning disability. Furthermore, the appellant never alluded to any psychological problems or any past treatment ***169** or institutionalization for psychological disorders.

[28] Thus, we conclude that defense counsel's performance was constitutionally adequate at the penalty phase. Moreover, the appellant suffered no prejudice as a result of counsel's performance. We base our conclusion upon the findings of Robert Steele, an investigator for the Capital Case Resource Center. At the post-conviction hearing, Steele testified that, after the appointment of Brock Mehler and Paul Morrow, attorneys for the Capital Case Resource Center, he began interviewing and collecting records in an attempt to identify mitigating themes. In addition to interviewing the appellant and his mother, the investigator contacted one hundred and forty individuals by phone or letter and received twenty-three responses. Steele's conclusions are summarized in his affidavit, submitted in support of the appellant's motion for support services.

Steele states in his affidavit that the appellant's father, Artie Harris, died in an automobile accident when the appellant was four years old. Following his father's death, the appellant's mother, Merlene Harris, lived with a man, Bob Turner, who physically abused both the appellant and his mother. The appellant and his brother were then placed in foster homes, where they remained until Mrs. Harris married a man named Melvin Nelms. The family moved to North Carolina. At this time, the appellant began running away from home, and was placed in various foster homes and institutions, including the Western Carolina Center. (FN10)

Concerning the appellant's mental health, the affidavit reflects that his mother was hospitalized for

measles and pneumonia while pregnant with the appellant. Furthermore, at the age of two, the appellant was struck by a car and suffered a severe head injury. While attending school, the appellant was placed in special education classes. As an adult, the appellant used drugs. While incarcerated at the Georgia penitentiary, the appellant was "stabbed in the head." While incarcerated at the DeKalb County Jail in Georgia, the appellant attempted to commit suicide. Finally, the appellant contends that the Western Carolina Center records indicate that he is "mentally defective" and has an I.Q. of 65; that, in 1966 and 1967, the appellant was diagnosed as "brain damage[d];" and that, in 1969, the Western Carolina Center diagnosed him as mentally retarded.

Assuming the accuracy of Steele's findings, we conclude that neither these findings nor the Western Carolina Center records are uniformly helpful to the appellant. *See, e.g., Whitmore,* 8 F.3d at 623. While many people have unhappy childhoods, few brutally murder two people. *Strouth v. State,* 755 S.W.2d 819, 827 (Tenn.Crim.App.1986). Moreover, the Western Carolina Center records document the appellant's propensity to engage in violent or antisocial behavior and may well have alienated the jury had they been introduced at the penalty phase of the appellant's trial. Finally, contrary to the appellant's assertion, the record before us establishes that further investigation by trial counsel of the appellant's mental condition would not have changed the jury's sentencing determination. In other words, further investigation would not have produced facts sufficient to tip the scales in favor of a sentence other than death.

The information contained in the Western Carolina Center admission and progress notes is ambiguous. (FN11) The initial admission interview with the Western Carolina Center, dated March 17, 1969, consisted of an interview with the appellant's mother, who was attempting to place her son at the Center. At the time of the interview, the appellant had completed two one-year commitments with the Juvenile Evaluation Center and was eligible for release. The records do not identify the particular state agency under which either center is operated i.e. mental health, education, social services, or correction. The ***170** records do reflect that the appellant's placement in the Juvenile Evaluation Center, pursuant to a juvenile court order, resulted from the appellant's frequent attempts to run away from home.

An initial report notes that the appellant is "an ambulatory, fully verbal, 11-year old boy with a serious behavior problem." The social services worker further observed, "Mrs. Nelms [the appellant's mother] told me that Eddie has 'brain damage' and is 'disturbed.' ... I feel that the unstable home situation has played a very large role in Eddie's behavior.... *'Brain damage' is the alibi she prefers to use to cover up her own inadequacies as a mother."* (Emphasis added).

The same report recites the following, "Dr. Nale at the Evaluation Center at Western Carolina University, has told Mr. and Mrs. Nelms [the appellant's parents] that Eddie's I.Q. was 'approximately average.' " In the only documented examination of the appellant by a physician, the physician concluded that the appellant suffered "[m]ild mental retardation *on a [s]ocio-cultural basis."* (Emphasis added).

Only one psychological report is contained in the Center's records. A school psychologist prepared this report, dated July 14, 1970. The psychologist conducted a personal interview with the appellant. Additionally, the psychologist administered a number of psychological tests to determine the appellant's level of functioning. The psychologist concluded:

> Eddie has assumed a style of aggression, retaliation, and lack of patience with others and himself, which would indicate little toleration for formal school structure and any other formal environment. Rules and regulations and good behavior frustrate him.... *I have no facts or reasons to suspect that he is mentally retarded.* His social behavior is so immature that it seems he is functioning as a poorly adjusted six year old.... He also shows indications that he can grasp a good deal of academically related material on a concrete level and that he could learn to develop moderate academic skills.
>
> (Emphasis added).

The "Admission Summary" from the Western Carolina Center does reflect that "[a]t one time [the appellant was] on Prolixin and had reaction to this with his eyes rolling back and getting stiff." However, contrary to Steele's affidavit, there is nothing in the Center's records to indicate that the appellant was ever administered Thorazine, much less "medicated with thorazine the entire time."

The above conclusions contradict the following undocumented observation in the Western Carolina clinical record: "Eddie has been quite healthy in general. His diagnosis by Dr. Nale at Cullowhee was brain damage 2 1/2 years ago." They similarly contradict the following comment, included in an additional report of the Western Carolina admission interview: "The psychological report from the Juvenile Evaluation Center indicated that Eddie is 'mentally defective, mild with behavior disorder.' He achieved an I.Q. of 65."

The last report from the Western Carolina Center, prepared by the appellant's social worker on May 3, 1971, reveals the following:

> Presently, Eddie is not on campus. He recently went home with his mother on a 30 day trial visit. contrary to the staff's recommendations. This occurred after Eddie's most recent AWOL episode.... Since Eddie's admission to the Center, he has presented many problems. He refuses to follow his scheduled routine and frequently wanders about doing as he pleases. He has a problem taking orders from and relating to people in authority. Running away has also proved to be a great problem with Eddie.... [T]he family is very unstable and the prognosis for Eddie's getting along well at home on this 30 day trial visit is very poor. I have seen little progress in my work with this family and feel that here, too, the prognosis for much improvement in this family's pattern of relationships and the mother's functioning in her role as wife and mother is poor.

Finally, assuming once again the accuracy of information contained in Steele's affidavit and considering the aggravating circumstances of this case, we conclude that the appellant has failed to meet his burden under *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. "It cannot be gainsaid that the cruelty of the *171 [murders] made it more difficult for [the appellant] to alter the final sentence by adducing mitigating circumstances." *Elledge v. Dugger,* 823 F.2d 1439, 1447 (11th Cir.1987). This issue is without merit.

MOTION FOR *EX PARTE* HEARING AND SUPPORT SERVICES

The appellant contends that the post-conviction court erred by denying his motion for an *ex parte* hearing and for support services. The basis of the appellant's motion is that his "claim of ineffective assistance of counsel involves a number of areas where the service of an expert is 'the single means of establishing prejudice.' " Specifically, the appellant contends that the appointment of a document examiner, a forensic pathologist, a criminal investigator, and a psychologist are necessary to protect his Sixth Amendment right to the effective assistance of counsel.

The post-conviction court denied the appellant's motion. Relying upon this court's decision in *Teague v. State,* 772 S.W.2d 915, 927 (Tenn.Crim.App.1988), *perm. to appeal denied,* (Tenn.), *cert. denied,* 493 U.S. 874, 110 S.Ct. 210, 107 L.Ed.2d 163 (1989), the post-conviction court ruled that "Tenn.Code Ann. § 40-14-407(b) does not authorize special support services in a post-conviction proceeding...." (FN12) The court added that "[t]he constitutional issue raised is whether joint trial counsel effectively represented petitioner according to constitutional standards. What trial counsel did or failed to do is of record."

[29][30] In *Owens and Payne,* 908 S.W.2d at 928, the Tennessee Supreme Court held that Tenn.Code Ann. § 40-14-207(b) (1995 Supp.) applies to post-conviction capital cases. (FN13) The court further held that, in order to obtain an *ex parte* hearing, a post-conviction petitioner must comply with the procedural guidelines set forth in Tenn.Sup.Ct.Rule 13(2)(B)(10). *Id.* Moreover, at the hearing, "a petitioner must demonstrate by specific factual proof that the services of an expert or an investigator are necessary to establish a ground for post-conviction relief, and that the petitioner is unable to establish that ground for post-conviction relief by other available evidence." *Id.* Thus, "[t]he trial court should grant the motion if ... the petitioner demonstrates that investigative or expert services are necessary to ensure the *protection of the petitioner's constitutional rights.* " *Id.* (emphasis added). In other words, within the post-conviction context, the support services sought must implicate a constitutional right.

In the case before us, the appellant seeks support services to ensure the protection of his Sixth Amendment right to the effective assistance of counsel. However, based upon the record before us, we have already determined that the appellant's claim of ineffectiveness is without merit. We agree with the post-conviction court's judgment that the record is adequate to the task. This issue is without merit.

MOTION TO RECUSE

The appellant contends that the post-conviction judge abused his discretion in failing to recuse himself from these proceedings because (1) the judge, at the time of his designation, was seeking the office of United States Senator, (2) the judge was a material witness with respect to the issues raised in the post-conviction proceeding, and (3) the impartiality of the trial judge might reasonably be questioned.

First, Tenn.Sup.Ct.Rule 10, Cannon 7(A)(3), in pertinent part, requires a judge to resign his office "when he becomes a candidate in a party primary or in a general election for a non-judicial office." The appellant correctly argues that it would be inappropriate for one seeking national office to *172 preside over a highly publicized death penalty post-conviction proceeding. However, absent the bald allegation by the appellant, nothing in the record suggests that the post-conviction judge was a candidate in the primary or general election for the position of United States Senator at the time of his designation as a special judge. Rather, the record contains the following facts relevant to this issue: On August 31, 1993, the judge resigned his office as Circuit Judge for the Fourth Judicial District of Tennessee in anticipation of his candidacy for the United States Senate. However, the judge subsequently reconsidered his position and chose not to seek elective office. Therefore, on September 29, 1993, when the Supreme Court of Tennessee designated him as a special judge to preside over the post-conviction proceeding in this case, the judge was not running for the United States Senate. This contention is without merit.

The appellant also alleges that the trial judge had personal knowledge of disputed facts relevant to issues raised at the post-conviction proceeding. Specifically, the appellant contends that the trial judge was aware of the following facts: the significance of Vastrick's and Jones' testimony concerning the Maggie Valley letter; when defense counsel became aware that Vastrick and Jones would testify; whether and when defense counsel were led to believe that the State was no longer seeking handwriting exemplars from the appellant; and whether the appellant was advised of the consequences of his refusal to provide additional exemplars.

[31][32][33][34] A motion to recuse is addressed to the sound discretion of the trial court. *State v. Parton,* 817 S.W.2d 28, 30 (Tenn.Crim.App.1991). Generally, "[w]hen a trial judge has no doubt of his ability to preside fairly over the matters presented, there is no need to grant a motion for recusal." *Johnson v. State,* No. 83-241-III, 1988 WL 3632 (Tenn.Crim.App. at Nashville, January 20, 1988), *aff'd in part. rev'd in part,* 797 S.W.2d 578 (Tenn.1990). However, the standard is ultimately an objective one. Thus, recusal is warranted "when a person of ordinary prudence in the judge's position, knowing all of the facts known to the judge, would find a reasonable basis for questioning the judge's impartiality." *Alley v. State,* 882 S.W.2d 810, 820 (Tenn.Crim.App.1994). The

standard of review on appeal is whether the trial court abused its discretion by denying the motion. *State v. Cash,* 867 S.W.2d 741, 749 (Tenn.Crim.App.1993).

[35][36][37] Tenn.Sup.Ct.Rule 10, Cannon 3(C) provides, "A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where: He has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding." However, prior knowledge of facts about the case is not sufficient in and of itself to require disqualification. *Alley,* 882 S.W.2d at 822. Moreover, we note that a judge is in no way disqualified merely because he has participated in other legal proceedings against the same person. *King v. State,* 216 Tenn. 215, 391 S.W.2d 637, 642 (1965). *See also State v. Demodica,* No. 99, 1990 WL 21233 (Tenn.Crim.App. at Knoxville), *perm. to appeal denied,* (Tenn.1990). The supreme court has observed that "[j]udicial knowledge upon which a decision may be based is ... the cognizance of certain facts the judge becomes aware of by virtue of the legal procedures in which he plays a neutral role." *Vaughn v. Shelby Williams of Tennessee, Inc.,* 813 S.W.2d 132, 133 (Tenn.1991). The court of appeals in *Embry v. Chimenti,* No. 02A01-9305-CV-00116, 1994 WL 81221 (Tenn.App. March 15, 1994), citing *Vaughn,* distinguished between a judge's knowledge obtained by virtue of his position in an earlier, related proceeding and knowledge obtained outside the courtroom. Thus, to disqualify, prejudice " 'must stem from an *extrajudicial* source and result in an opinion on the merits on some basis other than what the judge learned from ... participation in the case.' " *Alley,* 882 S.W.2d at 821 (citation omitted) (emphasis added).

[38] Accordingly, pursuant to Tenn.Code Ann. § 40-30-103 (1994 Supp.), the judge who presided at the trial in which a conviction occurred is permitted, although not required, to preside over post-conviction proceedings when the competency of trial *173 counsel has been challenged by the appellant. This practice is pervasive. Indeed, in this case, upon request of the Supreme Court, the trial judge suspended his retirement in order to preside over the post-conviction proceedings. (FN14) As suggested by the State, to require recusal whenever a trial judge in a post-conviction proceeding has knowledge of disputed facts would wreak havoc in the criminal justice system.

[39] It is true that a trial judge cannot both preside at a post-conviction proceeding and serve as a witness in that proceeding. *See* Tenn.R.Evid. 605; Cohen, Paine, and Sheppeard, *Tennessee Law of Evidence* (1990) § 605.1, pp. 247-248. However, having reviewed the record of the post-conviction proceedings, we conclude that the judge was not a significant source of information at the hearing, nor was the judge's decision ultimately influenced by that information. *Vaughn,* 813 S.W.2d at 134. Moreover, the record reflects that other witnesses were available to address the factual issues.

[40][41][42] The appellant nevertheless complains that the trial judge's conduct of the post-conviction hearing, including his findings at the conclusion of the hearing, render his impartiality suspect. Initially, we note that adverse rulings by a court are not usually sufficient grounds to establish bias. *Alley,* 882 S.W.2d at 821. Moreover, "[t]he issue to be determined is not the propriety of the judicial conduct of the judge, but whether he committed an error which resulted in an unjust disposition...." *State v. Hawk,* 688 S.W.2d 467, 472 (Tenn.Crim.App.1985). We conclude that the judge's remarks and actions at the post-conviction hearing, albeit on occasion ill-advised, did not diminish the overall fairness of the proceeding, even applying the heightened standards of due process applicable in a capital case. (FN15) *See State v. Cazes,* 875 S.W.2d 253, 260 (Tenn.1994), *cert. denied,* 513 U.S. 1086, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995). This issue is without merit.

MOTION FOR CONTINUANCE

On November 9, 1993, the appellant filed a motion to continue the post-conviction evidentiary hearing. In support of his motion, the appellant alleged that he had not completed the investigation of his claims. On November 23, 1993, the post-conviction court denied the appellant's motion.

On November 29, 1993, at the evidentiary hearing, the appellant renewed his motion for a continuance and made an offer of proof in the form of Robert Steele's testimony. Steele is an investigator and litigation specialist with the Capital Case Resource Center. As mentioned earlier, Steele testified that he had been coordinating the penalty phase investigation of this case since August, and that he had contacted 140 individuals in order to collect records relating to the appellant. He stated that he had received 23 responses, including the report from the Western Carolina Center. Steele stated that it would take approximately 6 to 9 months to complete the penalty phase investigation of this case. The court denied the renewed motion.

Additionally, on the morning of the post-conviction hearing, the appellant amended his petition, alleging in part that the grand and petit juries in this case were not representative of the community. The defense argued that they would require at least sixty days in order to investigate the systematic exclusion of certain cognizable groups from the Sevier County jury system. This motion for a continuance was also denied.

[43][44][45][46][47] It is well established that the decision whether to grant a continuance "rests within the discretion of the trial court." *State v. Morgan,* 825 S.W.2d 113, 117 (Tenn.Crim.App.1991), *perm. to appeal denied,* (Tenn.1992). Moreover, the denial of a continuance will not be disturbed "unless it *174 appears upon the face of the record that the trial judge abused his discretion and prejudice enured to the accused as a direct result of the trial judge's ruling." *State v. Dykes,* 803 S.W.2d 250, 257 (Tenn.Crim.App.1990). Additionally, in order to trigger post-conviction relief, the denial of a motion for continuance must implicate a constitutional right. Thus, the habeas petitioner "must demonstrate, first, that the ... court abused its discretion and, second, that its action rendered the [proceeding] fundamentally unfair." *Conner v. Bowen,* 842 F.2d 279, 283 (11th Cir.),

cert. denied, 488 U.S. 840, 109 S.Ct. 107, 102 L.Ed.2d 82, *and cert. denied,* 488 U.S. 864, 109 S.Ct. 164, 102 L.Ed.2d 135 (1988). We note that the grant or refusal of a continuance "rarely reaches constitutional proportions." *Knighton,* 740 F.2d at 1351.

[48] We conclude that the trial court did not abuse his discretion. The proof indicates that the Capital Case Resource Center first became involved in this case when its attorney, Brock Mehler, filed a petition for writ of certiorari to the United States Supreme Court. In February, 1993, the Supreme Court denied the petition. In June, 1993, the Capital Case Resource Center was appointed to represent the appellant in his post-conviction proceedings. At this time, post-conviction counsel withdrew the record, and, in July, 1993, reviewed the record. On August 10, 1993, counsel filed a petition. As previously noted, the evidentiary hearing was held on November 29, 1993. Thus, the appellant's counsel had access to the records in this case for at least five months prior to the post-conviction hearing, including three months following the filing of the appellant's petition.

Moreover, the appellant has failed to identify any prejudice affecting his conviction or sentence. It is undisputed that a continuance may be granted for the purpose of securing the presence of identifiable witnesses if the witnesses' testimony is material and admissible. However, in this case, the appellant sought a continuance in order to gather information which, at the time of the motion, was largely unknown and of entirely speculative value.

[49] Thus, while we do not wish to douse the flames of post-conviction counsel's zealous representation, a continuance of six to nine months under the facts presented is not warranted. Moreover, for the reasons already discussed, the post-conviction court's denial of the appellant's motions does not implicate his due process rights. This issue is without merit.

PREMEDITATION AND DELIBERATION

The appellant next contends that, in light of the Supreme Court's decision in *State v. Brown,* 836 S.W.2d 530, 534 (Tenn.1992), the evidence introduced at trial was insufficient to support premeditation and deliberation. Moreover, the appellant argues that, pursuant to *Brown,* the trial court's instruction to the jury, that premeditation may be formed in an instant, was improper.

In *Brown,* our supreme court held that "it is prudent to abandon an instruction that tells the jury that 'premeditation may be formed in an instant.' " *Id.* at 543. However, the *Brown* case was decided on June 1, 1992. The appellant's trial occurred in 1988. We have held that *Brown* is not to be applied retroactively. *Lofton v. State,* 898 S.W.2d 246, 249-250 (Tenn.Crim.App.1994), *perm. to appeal denied,* (Tenn.1995); *Peters v. State,* No. 03C01-9409-CR-00331, 1995 WL 632346 (Tenn.Crim.App. at Knoxville, October 30, 1995). Moreover, the supreme court's holding in *Brown* does not implicate a constitutional right or new rule of law. Accordingly, this court has repeatedly held that *Brown* may not be used as a basis for relief within the post-conviction context. *See, e.g., Lofton,* 898 S.W.2d at 249-250; *Peters,* No. 03C01-9409-CR-00331; *State v. Slate,* No. 03C01-9201-CR-00014, 1994 WL 228751 (Tenn.Crim.App. at Knoxville, May 23, 1994).

[50] This court in *Slate,* No. 03C01-9201-CR-00014, held that sufficiency of the evidence, generally, may implicate the due process rights of the appellant and is therefore a cognizable claim in post-conviction proceedings pursuant to Tenn.Code Ann. § 40-30-105 (1990). However, issues that have been previously determined on direct appeal cannot support a petition for post-conviction relief. Tenn.Code Ann. § 40-30-111, -112 ***175** (1990). *See also Harvey v. State,* 749 S.W.2d 478, 479 (Tenn.Crim.App.1987); *Gribble v. State,* No. 02C01-9303-CC-00039, 1995 WL 46379 (Tenn.Crim.App. at Jackson), *perm. to appeal denied,* (Tenn.1995); *Randolph v. State,* No. 03C01-9309-CR-00309, 1994 WL 421325 (Tenn.Crim.App. at Knoxville), *perm. to appeal denied,* (Tenn.1994), *cert. denied,* 514 U.S. 1066, 115 S.Ct. 1699, 115 S.Ct. 1699 (1995).

The appellant challenged the sufficiency of the evidence on direct appeal. *Harris,* 839 S.W.2d at 75-76. As noted earlier, the Supreme Court found that "[s]ince the overwhelming evidence supported the verdict of the jury, the judgment of conviction must be affirmed." *Id.* at 76. The appellant contends that, in evaluating the sufficiency of the evidence, the supreme court concentrated upon the evidence implicating the appellant in the crime and did not directly address the issues of premeditation and deliberation. The appellant cites this court's decision in *Slate,* No. 03C01-9201-CR-00014, in support of his argument. However, on direct appeal in *Slate,* the appellate court, without discussing the merits, held that the issue of sufficiency of the evidence was entirely waived. Therefore, the post-conviction appellate court found that the issue had not been previously determined. In contrast, in the instant case, the supreme court addressed the merits of the appellant's challenge to the sufficiency of the evidence. Thus, this issue has been previously determined and is not subject to review in this proceeding.

MIDDLEBROOKS ISSUE

The appellant also contends that because he was convicted of felony murder, the supreme court's decision in *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992), *cert. dismissed,* 510 U.S. 124, 114 S.Ct. 651, 126 L.Ed.2d 555 (1993), should be applied to invalidate the aggravating circumstance of felony murder. The record reveals that the jury found the appellant guilty of both felony murder and premeditated first degree murder, as to each victim. (FN16) Prior to the sentencing phase of the trial, the trial court "merged" the felony murder and premeditated murder verdicts, in effect dismissing the felony murder verdicts. (FN17)

In *Middlebrooks,* the Tennessee Supreme Court held that the state is precluded from using felony murder as an aggravating circumstance when the underlying conviction is felony murder. *Id.* at 346. In so holding, the court stated the following:

[W]hen the defendant is convicted of first-degree

murder solely on the basis of felony murder, the aggravating circumstance set out in Tenn.Code Ann. § 39-13-203(i)(7) (1982) and 39-13-204(i)(7) (1991), does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the U.S. Constitution and Article I, § 16 of the Tennessee Constitution because it duplicates the elements of the offense.

Id.

As the state correctly asserts, the appellant was not convicted "solely on the basis of felony murder." The jury returned guilty verdicts on counts of both premeditated and felony murder. This issue is without merit.

SEQUENTIAL JURY INSTRUCTIONS

The appellant next contends that "the jury's deliberative process was unfairly skewed by the Court's instruction." At the conclusion of the guilt phase of the trial, the judge instructed the jury on the elements of first degree murder. The judge then instructed the jury that it could only consider the lesser included offense of second degree murder if it first acquitted the appellant of the greater offense.

This court has repeatedly upheld the giving of so-called "acquittal first" instructions. *See State v. Raines,* 882 S.W.2d 376, 381-382 (Tenn.Crim.App.), *perm. to appeal denied,* (Tenn.1994); *State v. McPherson,* 882 S.W.2d *176 365, 375-376 (Tenn.Crim.App.), *perm. to appeal denied,* (Tenn.1994); *State v. Rutherford,* 876 S.W.2d 118, 119-120 (Tenn.Crim.App.1993), *perm. to appeal denied,* (Tenn.1994); *State v. Beckham,* No. 02C01-9406-CR-00107, 1996 WL 389321 (Tenn.Crim.App. at Jackson, September 27, 1995). Accordingly, this issue is without merit.

THE TENNESSEE DEATH PENALTY STATUTE

The appellant raises numerous constitutional challenges to Tennessee's death penalty statute. Although he acknowledges that the Tennessee Supreme Court has rejected each of these arguments in the past, he nevertheless raises them in order to preserve the issues for later review by the federal appellate courts.

The appellant first contends that Tennessee's death penalty statute fails to meaningfully narrow the class of death eligible defendants. Specifically, the appellant maintains that, in combination, aggravating circumstances (i)(2), (FN18) (5), (FN19) (6), (FN20) and (7) (FN21) apply to a majority of the homicides committed in Tennessee. He submits that, if he possessed the resources to investigate and obtain statistical evidence, he could show that "it is the exception rather than the rule that a homicide does not involve a collateral felony (i)(7) and, consequently, the killing of the victim/witness to that felony (i)(6), or does not involve the infliction of severe mental or physical pain (i)(5), or that the person who commits the homicide does not have a prior conviction for assault or any felony 'whose statutory elements involve the use of violence to the person' (i)(2)." This argument was rejected by this court in *State v. Odom,* No. 02C01-9305-CR-00080, 1994 WL 568433 (Tenn.Crim.App. at Jackson, October 19, 1994), *perm. to appeal granted,* (Tenn.1995). *See generally State v. Smith,* 868 S.W.2d 561, 582 (Tenn.1993), *cert. denied,* 513 U.S. 960, 115 S.Ct. 417, 130 L.Ed.2d 333 (1994); *State v. Cauthern,* 778 S.W.2d 39, 47 (Tenn.1989), *cert. denied,* 495 U.S. 904, 110 S.Ct. 1922, 109 L.Ed.2d 286 (1990). This issue has no merit.

The appellant also claims that the (i)(5) aggravating circumstance is vague and overbroad. Again, our supreme court has held that this statutory aggravating circumstance is constitutional. *See State v. Black,* 815 S.W.2d 166, 181-182 (Tenn.1991). This issue is without merit.

The appellant contends that the (i)(6) aggravating circumstance has been construed and applied in such a manner as to be duplicative of the (i)(7) aggravating circumstance. We conclude, however, that this issue need not be addressed, since the jury did not find that the (i)(6) aggravating circumstance is applicable in this case.

The following arguments raised by the appellant were rejected in *State v. Smith,* 857 S.W.2d 1 (Tenn.), *cert. denied,* 510 U.S. 996, 114 S.Ct. 561, 126 L.Ed.2d 461 (1993), *and cert. denied,* 510 U.S. 1040, 114 S.Ct. 682, 126 L.Ed.2d 650 (1994):

(1) the statute is unconstitutional because the death penalty has been imposed in a discriminatory manner based upon economics, race, geography, and gender, *Id.* at 23;

(2) the lack of uniform procedures mandating individual sequestered voir dire during jury selection renders the imposition *177 of the death penalty arbitrary and capricious, *Id.* at 20;

(3) the death penalty statute is unconstitutional because it limits the consideration of mitigating evidence by requiring the jury to unanimously agree on a life sentence, *Id.* at 18; and

(4) the death penalty statute is unconstitutional because the jury is not required to make the ultimate determination that the death penalty is appropriate, *Id.* at 22.

The following arguments raised by the appellant were rejected by the supreme court in *State v. Caughron,* 855 S.W.2d 526, 542 (Tenn.), *cert. denied,* 510 U.S. 979, 114 S.Ct. 475, 126 L.Ed.2d 426 (1993):

(1) by excluding jurors who have scruples against the death penalty, the jury selection process skews the make-up of the jury to make it prosecution-prone and thereby violates the defendant's constitutional rights; and

(2) the death penalty is arbitrarily and capriciously imposed because the State has the right of final closing argument at the penalty phase.

The following arguments raised by the appellant were rejected by the supreme court in *State v. Brimmer,* 876 S.W.2d 75, 86-87 (Tenn.), *cert. denied,* 513 U.S. 1020, 115 S.Ct. 585, 130 L.Ed.2d 499 (1994):

(1) the death penalty is imposed in an arbitrary and capricious manner because the defendant is not allowed to address issues such as parole eligibility, cost of incarceration versus cost of execution, deterrence, and method of execution;

(2) the death sentence is imposed in an arbitrary and capricious manner because the jury is not instructed as to the effect of a non-unanimous verdict;

(3) the death penalty is arbitrarily and capriciously imposed because the prosecutor is allowed discretion in deciding whether to seek the death penalty; and

(4) the death penalty statute is unconstitutional because there is a reasonable likelihood that the Tennessee Pattern Jury Instructions lead the jurors to believe that they are required to unanimously agree as to the existence of mitigating circumstances.

The appellant also argues that electrocution is a cruel and unusual punishment, thereby violating the appellant's constitutional rights. This argument was specifically rejected in *Black,* 815 S.W.2d at 178-179.

Finally, the appellant argues that the appellate review process in Tennessee is constitutionally inadequate. Specifically, he argues that appellate review in Tennessee is not meaningful for the following reasons: there is no uniform, state-wide procedure for collecting and evaluating data concerning the disposition of homicide cases; the cases of defendants convicted of some degree of homicide less than first degree murder and/or the cases of defendants who received a sentence of less than life imprisonment are not reported to the supreme court; the information collected by the trial judges in the Tenn.Sup.Ct.Rule 12 form is inadequate; the jury verdict form mandated by Tenn.Code Ann. § 39-2-203(f) (1982) did not require the jury to report mitigating circumstances and thereby renders appellate review of these circumstances impossible; and no published standard for review of proportionality is available. In short, the appellant asserts that "there is no meaningful body of collected data to which the defendant can refer and no standard upon which the defendant can rely to plead his case." This argument was specifically rejected by this court in *Odom,* No. 02C01-9305-CR-00080. *See also Cazes,* 875 S.W.2d at 270-271.

CONCLUSION

The record fully supports the post-conviction court's findings and conclusions. The appellant has clearly not met his burden of proof. We conclude that the petition for post-conviction relief was properly denied. For the reasons we have stated, the judgment of the post-conviction court is affirmed.

SUMMERS and BARKER, JJ., concur.

ORDER DENYING PETITION TO REHEAR

The appellant has filed a Petition to Rehear requesting that this court reconsider *178 our opinion holding that the appellant received the effective assistance of counsel at the guilt and sentencing phases of his trial. He contends that the court's opinion incorrectly states the material facts established by the evidence and set forth in the record, is in conflict with prior decisions, and overlooks material facts and propositions of law. Tenn.R.App.P. 39(a)(1), (2), and (3). Having thoroughly re-examined the record, we conclude that the issue of ineffective assistance of counsel has been adequately considered. Accordingly, the appellant's Petition to Rehear is denied. Nevertheless, recognizing the heightened standard of scrutiny applicable to the review of a sentence of death and to insure that our conclusions are sufficiently reflected on the record, we elect to address certain points raised by the appellant in his Petition. *See* Tenn.Code Ann. § 39-13-206(c)(1)(B), (c)(1)(C) (1994 Supp.).

[51] First, the appellant contests this court's citation to *Dees v. Caspiri,* 904 F.2d 452, 455 (8th Cir.), *cert. denied,* 498 U.S. 970, 111 S.Ct. 436, 112 L.Ed.2d 419 (1990), in support of the proposition that trial counsel's failure to further investigate the authorship of the Maggie Valley letter was a reasonable strategic decision. We acknowledge, as correctly pointed out by the appellant, that under Tennessee law trial counsel would *not* have been required to disclose to the State any unfavorable opinion by an expert whom he did not intend to call at trial or whose report he did not intend to introduce at trial. Tenn.R.Crim.P. 16(b)(1)(B) and (b)(2). *See also State v. Nichols,* 877 S.W.2d 722, 729-730 (Tenn.1994), *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *State v. Vilvarajah,* 735 S.W.2d 837, 839 (Tenn.Crim.App.1987); *State v. Bell,* 690 S.W.2d 879, 883 (Tenn.Crim.App.), *perm. to appeal denied,* (Tenn.1985). However, the appellant incorrectly infers that our evaluation of trial counsel's investigation of the Maggie Valley Letter relied upon *Dees,* 904 F.2d at 452.

Initially, we noted in our opinion that the appellant, by refusing to submit additional handwriting samples to the State, rejected an opportunity to exonerate himself as the author of the Maggie Valley letter. Moreover, the record does not support the appellant's position that defense counsel failed to further explore a November 20, 1987, report by document examiner James Kelly, in which Kelly indicated that "[c]omparison of the writing of Rufus Edward Doby with the writing in [the Maggie Valley letter] discloses similarities, but there are not enough for a positive identification." Kelly suggested in his report that the original copy of the Maggie Valley letter be submitted, along with additional writing samples from Doby.

For the purpose of clarification, we will outline the events concerning defense counsel's investigation of the Maggie Valley letter, as reflected in the record. Defense counsel received a copy of the Maggie Valley letter on February 2, 1988. They received samples of the appellant's handwriting on February 26, 1988. On or about February 29, 1988, defense counsel Charles Sexton communicated with Kelly. Kelly apparently informed Sexton that he had eliminated co-defendants Doby, Pelley, and DeModica as the author of the Maggie Valley letter. Defense counsel received Kelly's report on

approximately March 11, 1988. On the same day, defense counsel also received reports completed by the State's document examiner, Thomas Vastrick, which indicated that neither Pelley, DeModica, nor Doby had written the Maggie Valley letter. Vastrick's reports also reflected a possibility that the appellant had written the letter, but Vastrick required additional handwriting samples. Notes recovered from the file of defense counsel William Goddard, dated March 15, 1988, indicated that Sexton and Goddard contemplated consulting another handwriting expert, Buster Brown. At the post-conviction hearing, Sexton testified that defense counsel spoke with Mr. Brown but did not request an analysis. On April 5, 1988, the State submitted a motion for additional samples of the appellant's handwriting. Defense Counsel submitted a motion requesting a certificate of need which would allow the appellant to subpoena James Kelly for trial. On April 7, 1988, defense counsel received a report from Thomas Vastrick indicating that he was still unable to establish that the appellant was the author of the Maggie Valley letter. On April 11, 1988, defense counsel discussed with the court their efforts to obtain an opinion from ***179** Kelly that Doby, rather than the appellant, was the author of the letter. They indicated that they would like to send the original Maggie Valley letter and additional samples of Doby's handwriting to Kelly. On April 13, 1988, the court ordered the State to provide the requested materials to defense counsel, with the exception of the original Maggie Valley letter. However, the court indicated that, should the original letter prove indispensable, the State and defense counsel might, on their own, arrange to send the letter to Kelly, or defense counsel could submit additional motions to the court. Sexton testified at the post-conviction hearing that he could not recall specifically what happened after this hearing with respect to Mr. Kelly. However, he did state, "I believe at some point, in time, additional information [was] obtained, and I do believe that in the course of the proceedings those were eventually provided to Mr. Kelly." He also testified that defense counsel did engage in further communication with Kelly. However, he could not recall the outcome of those communications. Sexton also stated that defense counsel spoke with Vastrick and determined that Vastrick was unable to testify that the appellant wrote the Maggie Valley letter.

Thus, the record does not reveal whether or not Kelly was ever provided with the original Maggie Valley letter, additional samples of Doby's handwriting, or samples of the appellant's handwriting. As to the "eleventh-hour request for an expert on the eve of trial," this request was not necessarily a reflection of "haphazard" investigation, but rather a reaction to the "eleventh-hour" production by the State of an additional witness prepared to testify that the handwriting in the Maggie Valley letter was that of the appellant. The burden is on the appellant at a post-conviction proceeding to prove the allegations in his petition by a preponderance of the evidence. *McBee v. State,* 655 S.W.2d 191, 195 (Tenn.Crim.App.1983). *See also State v. Buford,* 666 S.W.2d 473, 475 (Tenn.Crim.App.1983), *perm. to appeal denied,* (Tenn.1984). While admittedly the issue of ineffective assistance of counsel in this case is a close one, we conclude that the appellant simply did not meet his burden of proof.

With respect to counsel's investigation at the penalty phase of the trial, we acknowledge that this court in *Cooper v. State,* 847 S.W.2d 521, 529 (Tenn.Crim.App.1992), indicated that there is a greater burden placed on defense counsel to investigate possible mitigating evidence at the penalty phase of a capital trial. However, in *Cooper,* 847 S.W.2d at 525-526, the defendant's sister told defense counsel about "the defendant's depression, attempted suicide, and his seeing [a clinical psychologist] ninety days before the killing.... she told the attorney about the involuntary commitment order which she had obtained for [the defendant] on the day of the killing." This court found that the attorney's failure to further investigate the defendant's psychological background and condition was ineffective assistance of counsel. Similarly, in *Adkins v. State,* 911 S.W.2d 334, 355 (Tenn.Crim.App.1994),*perm. to appeal dismissed,* (Tenn.1995), defense counsel learned from family members and friends that the defendant's father was an alcoholic who had abused the appellant. This court found that defense counsel's decision to forgo further investigation of mitigating evidence and his failure to present mitigating evidence were ineffective assistance of counsel. In *Bell v. State,* No. 03C01-9210-CR-00364, 1995 WL 113420 (Tenn.Crim.App. at Knoxville), *perm. to appeal denied,* (Tenn.1995), this court found that counsel's investigation and preparation for the penalty phase of the trial, including counsel's failure to request a psychological examination of the defendant, constituted ineffective assistance of counsel. As in the instant case, counsel failed to obtain juvenile records that arguably revealed the defendant's low I.Q. However, in *Bell,* No. 03C01-9210-CR-00364, counsel personally believed that the defendant was suffering psychological difficulties. Moreover, at the post-conviction hearing, counsel conceded that less preparation was done for the penalty phase of the trial than for the guilt/innocence phase. Counsel described the investigative effort as "not overwhelming."

In the instant case, the record does not support the appellant's assertion that defense counsel only began to prepare for the sentencing phase the weekend before trial. Rather, Sexton testified at the post-conviction ***180** hearing that, prior to that weekend, he "had looked at that, and worked on that...." As stated in our opinion, defense counsel interviewed the appellant on many occasions. During an early interview, counsel used an eight to ten page form to gather background information from the appellant. Defense counsel contacted the appellant's mother on several occasions. They also attempted to contact other individuals named by the appellant, largely without success. Sexton observed that "it was hard to find somebody that would take an interest in this man...." Sexton also testified that he could not recall being informed of either an abusive family situation or psychological or mental difficulties. There is no evidence in the record that defense counsel was aware of any psychological or mental difficulties. Indeed, Sexton testified that the appellant did not appear to suffer any "mental deficiencies." (FN1) The appellant testified at the sentencing phase that his poor performance in school resulted from a lack of motivation, rather than a lack of intelligence. With respect to medication administered to the appellant while he was in jail

awaiting trial, we would simply note that in *Elledge v. Dugger,* 823 F.2d 1439, 1444-1445 n. 10 (11th Cir.1987), *cert. denied,* 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d 715 (1988), the court found that trial counsel should have pursued the issue of the defendant's mental condition, upon learning that he was being treated with antipsychotic medications while in jail, because of trial counsel's personal conviction that the defendant was "crazy." In the instant case, Sexton testified that, at no time during the proceedings, did he feel that the appellant was suffering psychological difficulties.

The appellant also argues that the jury had no choice but to return a verdict of death. *Adkins,* 911 S.W.2d at 356. We disagree. During the penalty phase, defense counsel emphasized to the jury the appellant's limited education, the appellant's difficult relationship with his parents during his childhood, the fact that the appellant ran away from home at an early age, remaining doubt concerning the appellant's role in the murders, the fact that the appellant has two children, and testimony adduced during the guilt phase of the trial concerning various attempts by the appellant to "help[ ] people." Defense counsel and the appellant asked that the jury exercise mercy.

The appellant also suggests the presence of Eighth Amendment and Fourteenth Amendment claims stemming from the alleged errors of his trial counsel. This court acknowledges that the Supreme Court has held that it is a violation of the Eighth and Fourteenth Amendments for a state, by statute, or a judge to preclude a jury from considering mitigating evidence in a capital case. *See, e.g., Hitchcock v. Dugger,* 481 U.S. 393, 394, 107 S.Ct. 1821, 1822, 95 L.Ed.2d 347 (1987); *Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S.Ct. 1669, 1670-1671, 90 L.Ed.2d 1 (1986); *Eddings v. Oklahoma,* 455 U.S. 104, 111-114, 102 S.Ct. 869, 875-876, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978). However, the Supreme Court has consistently analyzed *counsel's* failure to present mitigating evidence against the standards of the Sixth Amendment. *See, e.g., Burger v. Kemp,* 483 U.S. 776, 788-795, 107 S.Ct. 3114, 3122-3126, 97 L.Ed.2d 638 (1987); *Strickland v. Washington,* 466 U.S. 668, 687-692, 698-699, 104 S.Ct. 2052, 2065-2066, 2070-2071, 80 L.Ed.2d 674 (1984).

[52][53] With respect to prejudice at the sentencing phase, under *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069, we must consider whether the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Thus, contrary to the appellant's assertion, in noting the brutal nature of the crimes involved, we in no way implied that the appellant's crimes are "unmitigatable." Moreover, in evaluating possible prejudice to the appellant, ***181.** our review is limited to those mitigating factors reflected in the record. Therefore, our observation concerning the mitigating evidence arguably available to the appellant was only intended to describe the evidence reflected in the record. (FN2) In conclusion, we agree that it is neither this court's right nor prerogative to impose any limitation on mitigating evidence that may be considered by the jury in a capital case. *Hitchcock,* 481 U.S. at 394, 107 S.Ct. at 1822; *Skipper,* 476 U.S. at 4, 106 S.Ct. at 1670-1671; *Eddings,* 455 U.S. at 111-114, 102 S.Ct. at 875-876; *Lockett,* 438 U.S. at 604, 98 S.Ct. at 2964-2965.

For the reasons stated above, the appellant's Petition to Rehear is denied.

(FN1.) The prior convictions were for the offenses of rape, aggravated robbery, and aggravated sodomy.

(FN2.) Tenn.Code Ann. § 39-2-203(i)(2), (5), and (7) provide as follows:

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

(5) The murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, ...

(FN3.) The appellant was arrested on December 16, 1987, in Atlanta, Georgia.

(FN4.) The record indicates that the case before us is the first capital case to culminate in a jury verdict of death in Sevier County during this century.

(FN5.) Goddard did not testify at the post-conviction hearing, as he was killed in an automobile accident approximately eight days after the completion of the appellant's trial.

(FN6.) The appellant also alleges that counsel failed to adequately investigate the appellant's mental condition at the guilt, penalty, and direct appellate stages of these proceedings. We fully address this issue in our discussion of the penalty phase.

(FN7.) The appellant mentions in his brief that DeModica exploded and struck at his counsel during his sentencing hearing. The record before us does not reveal whether this incident in fact occurred, or whether defense counsel were aware of the incident, assuming that it occurred.

(FN8.) The *only* feasible mitigating, factors available to the appellant were mental disease or defect, pursuant to Tenn.Code Ann. § 39-2-203(j)(8) (1982), and his troubled background, pursuant, generally, to Tenn.Code Ann. § 39-2-203(j) (1982).

(FN9.) At the post-conviction hearing, the appellant filed as an exhibit medical records from the Sevier County jail which show that, prior to trial, the appellant was given Haldol and Xanax, because he was suffering some anxiety and depression and was experiencing difficulty sleeping. A "Statement of General Health Condition" noted that the appellant is allergic to Thorazine. Arguably, these records would not have alerted

defense counsel that the appellant was suffering any psychological difficulties other than those understandably experienced by one awaiting trial for the murders of two individuals where the State was seeking the death penalty.

(FN10.) We note that, other than Steele's testimony, there is no proof in this record that the Western Carolina Center is a state institution for the mentally retarded.

(FN11.) The admission and progress notes were prepared by social workers. They frequently fail to cite the source of information included in the notes and provide no documentation to establish the accuracy of the information.

(FN12.) The post-conviction court's ruling preceded the Tennessee Supreme Court's decision in the consolidated cases of *Owens and Payne v. State,* 908 S.W.2d 923, 928 (Tenn.1995), which expressly overruled the dicta of *Teague.*

(FN13.) Tenn.Code Ann. § 40-14-207(b) provides in pertinent part:

[I]n capital cases where the defendant has been found to be indigent by the court of record having jurisdiction of the case, such court in an *ex parte* hearing may in its discretion determine that investigative or expert services or other similar services are necessary to ensure that the *constitutional rights of the defendant are properly protected* ...

(Emphasis added).

(FN14.) At the post-conviction proceeding, the trial judge remarked, "The Judges asked me to hear it. I thought well we don't want anything for someone to grasp at on these proceedings ... let us do it by the numbers, ... and so the supreme court appointed me to hear it...."

(FN15.) The appellant also challenged the impartiality of this judge on direct appeal. The Tennessee Supreme Court found, "An examination of the entire record establishes that the trial court did not conduct the trial in a manner showing bias in favor of the State.", *Harris,* 839 S.W.2d at 66.

*181_ (FN16.) The appellant was indicted on two counts of premeditated first degree murder and two counts of felony murder. All four counts were submitted to the jury.

(FN17.) Similarly, in *State v. Hurley,* 876 S.W.2d 57, 69-70 (Tenn.1993), where the defendant was convicted of both felony murder and premeditated first degree murder of one victim, the supreme court dismissed the felony murder count.

(FN18.) Tenn.Code Ann. § 39-2-203(i)(2) (1982) sets forth the aggravating circumstance that "[t]he defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person."

(FN19.) Tenn.Code Ann. § 39-2-203(i)(5) (1982) sets forth the aggravating factor that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind."

(FN20.) Tenn.Code Ann. § 39-2-203(i)(6) (1982) sets forth the aggravating factor that "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing the lawful arrest or prosecution of the defendant or another."

(FN21.) Tenn.Code Ann. § 39-2-203(i)(7) (1982) sets forth the aggravating factor that "[t]he murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb."

(FN1.) When counsel has no reason to know of a client's mental problems, the Sixth Amendment does not impose a general duty to explore the defendant's mental capacity. *See, e.g., Riley v. Snyder,* 840 F.Supp. 1012, 1027 (D.Del.1993) (citing *United States ex rel. Rivera v. Franzen,* 794 F.2d 314 (7th Cir.), *cert. denied,* 479 U.S. 991, 107 S.Ct. 588, 93 L.Ed.2d 590 (1986), and *Clanton v. Bair,* 826 F.2d 1354 (4th Cir.1987), *cert. denied,* 484 U.S. 1036, 108 S.Ct. 762, 98 L.Ed.2d 779 (1988)).

(FN2.) Our consideration of possible prejudice pursuant to *Strickland* has encompassed the appellant's background, possible mental difficulties, and other mitigating factors argued by defense counsel during the penalty phase.

***526** 855 S.W.2d 526

Supreme Court of Tennessee,
at Knoxville.

STATE of Tennessee, Appellee,
v.
Gary June CAUGHRON, Appellant.
May 10, 1993.

Defendant was convicted in the Criminal Court, Sevier County, J. Kenneth Porter, J., of first-degree premeditated murder, first-degree burglary, and assault with intent to commit rape and was sentenced to death. Defendant appealed. The Supreme Court, Drowota, J., held that: (1) trial court did not abuse its discretion in refusing to grant defendant pretrial continuance; (2) accomplice's testimony was sufficiently corroborated; and (3) evidence supported finding of aggravated circumstance for purposes of death penalty.

Affirmed.

Daughtrey, J., dissented and filed opinion in which Reid, C.J., joined.

West Headnotes

[1] Criminal Law ⚿1151
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1151 Continuance.
It must be clearly shown that trial court has abused its discretion in refusing to grant continuance before that decision will be disturbed on appeal.

[2] Criminal Law ⚿596(1)
110 ----
110XIX Continuance
110k588 Grounds for Continuance
110k596 Cumulative or Impeaching Evidence
110k596(1) Cumulative Evidence in General.
Trial court did not abuse its discretion in refusing to grant murder defendant continuance before trial to take testimony or deposition of investigating officer on grounds that officer possessed crucial knowledge that groceries were in victim's truck when body was discovered; trial court determined that officer's testimony would have been cumulative in light of existence of other officers who should have possessed same knowledge and victim's daughter testified that she had unloaded bags of groceries from truck after she had found victim.

[3] Criminal Law ⚿595(1)
110 ----
110XIX Continuance
110k588 Grounds for Continuance
110k595 Competency or Materiality of Expected Evidence
110k595(1) Materiality of Evidence in Prosecution for Homicide in General.
Trial court did not abuse its discretion in refusing to grant murder defendant continuance before trial to investigate additional suspects in statements given to defense by state; defendant failed to show materiality and relevance of any evidence such investigation would yield or that different result would have been reached if continuance had been granted.

[4] Criminal Law ⚿589(1)
110 ----
110XIX Continuance
110k588 Grounds for Continuance
110k589 In General
110k589(1) In General.
Trial court did not abuse its discretion in refusing to grant murder defendant continuance before trial to examine broken-in door of victim's bedroom so as to show that footprint on door was larger than defendant's; door had been made available to defense attorney for examination three days before defendant's motion for continuance and inconsistency of footprint on door with defendant's footprint was explored during forensic scientist's testimony.

[5] Criminal Law ⚿594(1)
110 ----
110XIX Continuance
110k588 Grounds for Continuance
110k594 Absence of Witness or Evidence in General
110k594(1) In General.
Trial court did not abuse its discretion in refusing to grant murder defendant continuance before trial to permit FBI agent to testify, despite fact that trial court denied continuance on mistaken belief that agent would testify, where agent's testimony was presented to jury through stipulation and defense counsel later stated that he did not want continuance because of stipulation.

[6] Criminal Law ⚿627.7(3)
110 ----
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.7 Statements, Disclosure of
110k627.7(3) Statements of Witnesses or Prospective Witnesses.
Purpose of rule requiring party to provide opponent with statements of witness relating to subject matter of witness' testimony is to enable counsel to examine witness' statements to test credibility of witness at trial. Rules Crim.Proc., Rule 26.2.

[7] Criminal Law ⚿627.8(2)
110 ----
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(2) Time When Disclosure Is Permitted.
Trial court did not abuse its discretion by denying request of counsel for murder defendant second night in which to review statements relating to direct testimony of state witness for cross-examination; state had provided statements to defense on previous evening approximately 22 hours before cross-examination and witness was young girl who had required several recesses for her to regain her composure. Rules Crim.Proc., Rule 26.2(d).

[8] Criminal Law ⚿627.8(2)
110 ----

110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(2) Time When Disclosure Is Permitted.

Trial judges cannot require advance disclosure of witness' statements under rule requiring party after direct examination to provide opponent with statements of witness relating to subject matter of witness' testimony. Rules Crim.Proc., Rule 26.2.

[9] Criminal Law ⚭438(4)
110 ----
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(4) Depiction of Places; Scene of Crime.

[See headnote text below]

[9] Criminal Law ⚭438(8)
110 ----
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(8) Special Types of Photographs; Enlargements, Motion and Sound Pictures, X-Rays.

Trial court did not abuse its discretion in admitting photographs and videotape taken at murder scene; photographs and videotape were highly probative and depictions were not shocking or gruesome.

[10] Criminal Law ⚭656(9)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k656 Comments on Evidence or Witnesses
110k656(9) Expressions as to Weight and Sufficiency of Evidence and Guilt of Accused.

Trial court did not indicate to jury that it believed that defendant was guilty so as to constitute reversible error in murder prosecution by virtue of interrupting defendant's cross-examination of witnesses, commenting during defendant's direct examination of witness, and telling jury that they did not have to look at potentially distasteful physical evidence; trial court's behavior did not so clearly violate mandate of impartiality as to infringe upon right to fair trial and no prejudice was shown. U.S.C.A. Const.Amend. 6.

[11] Criminal Law ⚭655(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k654 Remarks and Conduct of Judge
110k655 In General
110k655(1) In General.

Trial judge should exercise care not to express any thought that might lead jury to infer that judge is in favor of or against defendant.

[12] Criminal Law ⚭473
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
*526 110k473 Bodily Condition.

Trial court did not abuse its discretion in allowing forensic pathologist to characterize injuries on murder victim's back as "whipping marks" and those on victim's buttock as slap injury; pathologist was board certified and had conducted 2500 forensic investigations.

[13] Criminal Law ⚭469.2
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k469.2 Discretion.

Admission of expert testimony is largely in discretion of trial judge.

[14] Criminal Law ⚭419(2.20)
110 ----
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.20) Then-Existing State of Mind or Body.

[See headnote text below]

[14] Criminal Law ⚭419(2.40)
110 ----
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2.40) Evidence Showing Intent, Motive, or Nature of Act.

Testimony of murder defendant's girlfriend, that she was upset with victim because of conversation victim had had with girlfriend's mother, that she was mad at victim because victim did not approve of defendant and girlfriend, and that she hurt victim because she hated victim for going to girlfriend's mother and trying to separate girlfriend from defendant, was not inadmissible hearsay, as testimony was not offered to prove truth of matter asserted, but to show girlfriend's state of mind and what provoked her to harm victim. Rules of Evid., Rule 801(c).

[15] Criminal Law ⚭419(2)
110 ----
110XVII Evidence
110XVII(N) Hearsay
110k419 Hearsay in General
110k419(2) Evidence as to Fact of Making Declarations and Not as to Subject-Matter.

Testimony of mother of murder defendant's girlfriend that victim had told mother that victim did not trust defendant was not inadmissible hearsay, as import of testimony was that conversation occurred, not that victim's statement was true. Rules of Evid., Rule 801(c).

[16] Witnesses ⚭77
410 ----
410II Competency
410II(A) Capacity and Qualifications in General
410k77 Examination of Witness as to

Competency.
Trial court did not abuse its discretion by failing to ask juvenile witness in competency evaluation in murder prosecution whether she understood difference between telling truth and lie and whether she comprehended importance of telling truth; trial judge asked witness general questions and questions about her awareness of her testimony before declaring her competent to testify. Rules of Evid., Rule 601; T.C.A. § 24-1-101 (Repealed).

[17] Witnesses ⚿40(1)
410 ----
410II Competency
410II(A) Capacity and Qualifications in General
410k40 Age and Maturity of Mind
410k40(1) In General.
Under rule and statute governing witness competency, no one is automatically barred from testifying simply because of age or mental status. Rules of Evid., Rule 601; T.C.A. § 24-1-101 (Repealed).

[18] Witnesses ⚿35
410 ----
410II Competency
410II(A) Capacity and Qualifications in General
410k35 Capacity in General.
Question of witness competency is matter for trial court's discretion.

[19] Criminal Law ⚿1170.5(1)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Witnesses
110k1170.5(1) Rulings in General.

(Formerly 110k11701/2(1))
Any error was not reversible in trial court allowing prosecution to ask leading questions of murder defendant's girlfriend on direct examination; girlfriend was young and highly emotional witness, it was necessary to lead her to develop her testimony, and prejudice was not clearly shown. Rules of Evid., Rule 611(c).

[20] Criminal Law ⚿1063(1)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)3 Motions for New Trial or in Arrest
110k1063 Necessity of Motion for New Trial or in Arrest
110k1063(1) In General.
Murder defendant waived for appellate review issue of admissibility of testimony by failing to raise alleged errors in motion for new trial. Rules App.Proc., Rule 3(e).

[21] Criminal Law ⚿510.5
110 ----
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k510.5 Admissibility.

(Formerly 110k5101/2)

[See headnote text below]

[21] Homicide ⚿162
203 ----
203VII Evidence
203VII(B) Admissibility in General
203k162 Commission of or Participation in Act by Accused in General.
Testimony of murder defendant's former friend that defendant had pool stick that broke down into three pieces, had material similar to that used in murder in defendant's automobile, talked about tying up women during sex, and made statement regarding slapping women on buttocks was relevant to connect defendant to murder and corroborate accomplice's testimony.

[22] Criminal Law ⚿1169.2(3)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.2 Curing Error by Facts Established Otherwise
110k1169.2(3) Other Offenses and Character of Accused.
Erroneous admission of testimony of murder defendant's former friend respecting defendant's drug use, satanic sketches, and listening to rock music, which corroborated accomplice's statements, was harmless error, as accomplice's testimony had already presented those features of defendant's character. Rules of Evid., Rule 404(b).

[23] Criminal Law ⚿338(6)
110 ----
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k338 Relevancy in General
110k338(6) Evidence for Purpose of Testing, Sustaining, or Impeaching Credibility or Character of Witnesses and Others.
Testimony of mother of murder defendant's girlfriend that around time of murder girlfriend was having trouble in school and crying and that defendant "sneaked around" her house after murder was admissible, despite its marginal relevance; testimony tended to bolster credibility of girlfriend, who testified for prosecution as accomplice.

[24] Witnesses ⚿262
410 ----
410III Examination
410III(A) Taking Testimony in General
410k261 Recalling Witnesses
410k262 In General.
Trial court did not abuse its discretion in allowing state to recall murder victim's daughter to testify that victim owned shot glasses and pink toothbrush; evidence was relevant because of accomplice's testimony about drinking victim's blood from shot glass and testimony about defendant's pink toothbrush.

[25] Criminal Law ⚿1153(1)
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception of Evidence
110k1153(1) In General.

[See headnote text below]

[25] Witnesses ⚖262
410 ----
410III Examination
410III(A) Taking Testimony in General
410k261 Recalling Witnesses
410k262 In General.
Allowing recall of witness is left to sound discretion of trial judge, whose decision will only be disturbed upon showing of abuse of discretion.

[26] Criminal Law ⚖1166(10.10)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1166 Preliminary Proceedings
110k1166(10.10) Discovery and Disclosure; Transcripts of Prior Proceedings.
Any error was not reversible in admission of law enforcement officer's testimony respecting murder defendant's statements concerning his attempted suicide after state's alleged failure to supply defendant's statements to defense as ***526** required by rule, as defendant failed to show actual prejudice. Rules Crim.Proc., Rule 16(a)(1)(A).

[27] Criminal Law ⚖868
110 ----
110XX Trial
110XX(J) Issues Relating to Jury Trial
110k868 Objections and Exceptions.
When juror is not legally disqualified or there is no inherent prejudice, burden is on defendant to show that juror is in some way biased or prejudiced.

[28] Jury ⚖149
230 ----
230VI Impaneling for Trial, and Oath
230k149 Discharge of Juror or Jury Pending Trial.
Murder defendant was not entitled to mistrial by virtue of juror's remark, "What's the difference?" during defense counsel's cross-examination of accomplice witness as to why witness had lied to law enforcement officers regarding whom she had told about crime; juror was subsequently removed, there was no indication that remaining jurors were prejudiced against defendant by remark, and remark was comment upon counsel's repetitive questioning and not upon merits of case.

[29] Jury ⚖149
230 ----
230VI Impaneling for Trial, and Oath
230k149 Discharge of Juror or Jury Pending Trial.
In absence of proof to the contrary, it is assumed that all jurors who rendered verdict were impartial and qualified and that mistrial was not warranted.

[30] Criminal Law ⚖1170.5(1)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1170.5 Witnesses
110k1170.5(1) Rulings in General.

(Formerly 110k11701/2(1))
Trial court's actions in restricting murder defendant's direct examination of crime laboratory personnel did not constitute reversible error, despite fact that court was unusually active in directing form that questioning should take; defendant was not precluded from developing his theory, court did not prohibit any testimony shown to be relevant, and actions did not reflect court's views on defendant's innocence or its opinion of merit of defendant's proof. U.S.C.A. Const.Amend. 6.

[31] Criminal Law ⚖667(1)
110 ----
110XX Trial
110XX(C) Reception of Evidence
110k667 Taking Oral Testimony in General
110k667(1) In General.

[See headnote text below]

[31] Criminal Law ⚖1153(4)
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception of Evidence
110k1153(4) Examination of Witnesses.
Propriety, scope, manner, and control of examination of witnesses is matter within discretion of trial judge, subject to appellate review for abuse of discretion.

[32] Criminal Law ⚖627.8(4)
110 ----
110XX Trial
110XX(A) Preliminary Proceedings
110k627.5 Discovery Prior to and Incident to Trial
110k627.8 Proceedings to Obtain Disclosure
110k627.8(4) Examination by Court; Inspection in Camera.
Trial court did not abuse its discretion in refusing to examine state's entire files in murder prosecution to determine whether state had failed to hand over anything that might be vital to preparation of defense; defendant never requested court to examine any specific document or evidence.

[33] Criminal Law ⚖632(4)
110 ----
110XX Trial
110XX(A) Preliminary Proceedings
110k632 Dockets and Pretrial Procedure
110k632(3) Motions
110k632(4) Motions in Limine.

[See headnote text below]

[33] Criminal Law ⚖693
110 ----
110XX Trial
110XX(D) Procedures for Excluding Evidence
110k693 Time for Objection.
Trial court did not abuse its discretion in murder prosecution by refusing to allow defense counsel to present motions in limine prior to testimony of state witnesses and requiring counsel to object to questions as they were asked; court was not required as a regular practice to speculate on admissibility of evidence without context in which evidence would be presented.

[34] Criminal Law ⚖695.5
110 ----
110XX Trial
110XX(D) Procedures for Excluding Evidence

110k695.5 Hearing, Ruling, and Objections.

(Formerly 110k6951/2)
Trial court is generally given broad discretion in timing of its decisions on admissibility of evidence.

[35] Criminal Law ⚖633(1)
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k633 Regulation in General
110k633(1) In General.
Trial court has broad discretion in controlling course and conduct of trial.

[36] Criminal Law ⚖417(10)
110 ----
110XVII Evidence
110XVII(M) Declarations
110k416 Declarations by Third Persons
110k417 In General
110k417(10) Declarations Exculpating Accused.
Murder defendant was not entitled to admission of inmate's extrajudicial statement exculpating defendant on ground that inmate was "unavailable," despite inmate's refusal to testify; inmate stated that statement was lie concocted to get reward for evidence helping to solve murder and statement did not bear persuasive assurances of trustworthiness. Rules of Evid., Rule 804.

[37] Criminal Law ⚖823(1)
110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k823 Error in Instructions Cured by Withdrawal or Giving Other Instructions
110k823(1) In General.
Trial judge's corrective reinstruction respecting aggravating circumstance of murder being especially cruel in that it involved torture or depravity of mind did not improperly draw undue attention to that part of jury charge where trial court specifically instructed jury that it had acted, not to emphasize that part of charge, but to comport with law. T.C.A. § 39-2-203(i)(5) (now § 39-13-204(i)(5)).

[38] Criminal Law ⚖645
110 ----
110XX Trial
110XX(B) Course and Conduct of Trial in General
110k645 Right to Open and Close.
Murder defendant was not entitled to make final closing argument at sentencing phase. T.C.A. § 39-13-204(d).

[39] Sentencing and Punishment ⚖1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.

(Formerly 203k311)
Murder defendant was not entitled to instruction that jurors should presume that sentence they assess would actually be carried out, that if life sentence was imposed a life sentence would be served and that if death penalty was assessed defendant would be executed.

[40] Criminal Law ⚖511.4
110 ----
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.4 Competency and Sufficiency of Particular Facts in General.
Other evidence sufficiently corroborated inculpatory testimony of murder defendant's accomplice; two witnesses testified about fabrics in defendant's possession such as those used in murder, there was inculpatory testimony respecting defendant's appearance and behavior on morning after murder, ring of type owned by defendant was present at victim's house, and defendant made inculpatory statements to his cellmates.

[41] Sentencing and Punishment ⚖1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(11))
Evidence showed that murder involved torture and depravity of mind so as to support jury finding of aggravating circumstance for purposes of death penalty; defendant told victim that she was going to die as she begged ***526** for her life, inflicted head injuries, tied victim to bed, attempted to rape her, beat her with pool stick, slapped victim's buttocks so as to leave imprint of defendant's hand, gagged and strangled victim, drank victim's blood, and had sex with accomplice near dying victim. T.C.A. § 39-2-203(i)(5) (now § 39-13-204(i)(5)).

***529** Charles W. Burson, Atty. Gen. and Reporter, Merrilyn Feirman, Asst. Atty. Gen., Nashville, Al Schmutzer, Jr., Dist. Atty., Sevierville, for appellee.

Carl R. Ogle, Jr., Jefferson City, for appellant.

***530** OPINION

DROWOTA, Justice.

The Defendant, Gary June Caughron, appeals directly to this Court his conviction of first degree premeditated murder and the sentence of death imposed by the jury, and his convictions of first degree burglary, and assault with intent to commit rape. He raises numerous issues in this appeal; but, after careful review of the entire record and the law, we find these issues to be without merit. The verdict and judgment are supported by material evidence, and the sentence of death is in no way arbitrary or disproportionate. We therefore affirm the convictions and the sentences.

THE FACTS

In the early afternoon of July 11, 1987, Christy

Jones Scott, the daughter of the victim, 42-year-old Ann Robertson Jones, discovered her mother's partially clothed body lying facedown on a bed in her home in Pigeon Forge. Jones's legs and arms had been bound and tied to the bed with strips of blue terry cloth and pieces of sheer, off-white material like that used for table cloths and curtains. There was a gag tied across her mouth, and strips of the blue terry cloth had been wrapped tightly around her neck.

According to the state's forensic pathologist, Dr. Cleland Blake, Jones had suffered several "blunt traumatic contusions" to her head. These injuries were consistent with those caused by a blunt or rounded object and would have rendered Jones unconscious at some point. Her skull had been fractured and the cartilage in her nose displaced by the beating. She had bled extensively from her mouth and nose. There was a "patch" of "scraping type of injuries caused by some kind of slender linear object ... like whipping marks" on the left back side of her chest beneath her shoulder blades. On the right buttock were "three linear imprints, ... superficial bruises that fit perfectly with four fingers of a hand." Dr. Blake stated that these represented a "hard slap injury to the buttock" inflicted while the victim was still alive. The terry cloth strips around the victim's neck had been pulled so tightly that they had cut off the flow of blood to the victim's brain. The gag, bound so tightly that it cut a deep groove into the corners of the victim's mouth, combined with the hemorrhaging in the nasal passages, had caused her to suffocate. Dr. Blake concluded that Jones had died as a result of asphyxiation while unconscious.

Examination of the scene of the crime revealed that the door to the bedroom where the body was found had been forced open. A purse and its contents lay strewn in the hall. The phone lines to the house had been cut. Sometime within the following two or three weeks, Christy Jones Scott discovered a silver, turquoise and coral ring with a thunderbird design lying on the ground beside her mother's truck, which was still parked at her mother's house.

The key witness in this case was April Marie Ward, who was 14 years old at the time of the killing. Almost everything that the jury learned about Ann Jones's death, other than the description of the crime scene given by investigators, came from April's testimony. That testimony is summarized below.

In early summer 1987, according to April, she and the 27-year-old Defendant met and became romantically involved. April Ward's mother, Lettie Marie Cruze, worked at the Turquoise Jewelry Shop in Settler's Village, a group of shops in Pigeon Forge. Ann Jones ran the Wild Hare Tee Shirt Shop in this same shopping center. April and the Defendant, who was working on a nearby construction project, met on the covered portico (commonly referred to as "the porch") of Settler's Village almost every day.

One night, two or three weeks before the murder, Ann Jones made the Defendant Caughron, who had been drinking, leave her shop because he was acting in a disorderly manner. Jones instructed him to stay away. This upset Caughron, who told April Ward that he would like to catch Ann Jones "out one night" and "slice her throat." The Defendant suggested that April accompany Jones to her house after *531 work and give him directions on how to get there. He also asked April to watch Jones as she closed her shop and see where she put her money, and to find out if Jones was married and had a telephone or pets.

Because she knew that her mother would have disapproved of her relationship with the Defendant if she had known his true age, April had told her mother that the Defendant was 18. April then became upset with Ann Jones because of a conversation Jones had had with her mother that led to her mother's disapproval of the relationship. April testified that she hated Jones because she had tried to separate her and the Defendant by going to her mother. April also said that she had told the Defendant what Jones had done.

The week before the murder, according to April, she and the Defendant began talking about going to the victim's house. She said that the Defendant instructed her to bring a towel and a knife "to gut" Ann Jones. On the afternoon of Friday, July 10, around 3:00 or 4:00 p.m., the Defendant came by April's house in an older model green and white 442 Oldsmobile Cutlass that he had just purchased. He told April that he would return that night and that the two would go to the victim's house as planned.

April further testified that after her mother went to sleep, she cut a blue terry cloth towel into strips and waited for Caughron to arrive. He picked her up sometime after midnight. He had been drinking but, according to April was "not drunk." (Another witness, Vicky Worth, testified that she had seen the Defendant drinking beer and smoking marijuana at a restaurant around 10 or 11 o'clock that night.) On their way to Ann Jones's house April and the Defendant drank alcohol and took drugs. They walked to the victim's house from the parking lot of a nearby nursing home, where they had left the Oldsmobile. The Defendant carried with him the handle of a pool stick, around which he had placed gray duct tape, and pieces of the sheer material that he already had in his car. The Defendant gave April a survival knife.

April testified that Caughron entered the house by himself and then summoned her inside. As they went down the hall to Jones's bedroom, April could hear her calling, "Who is it? What are you doing?" She testified that the Defendant kicked in the bedroom door, which was locked. According to April, Jones cried and pleaded with them not to hurt her, but the two told her she was going to die. April later testified that after the Defendant hit Jones several times with the pool stick, Jones fell across her bed, became silent and stopped moaning. As April described the scene, the Defendant turned Jones on her stomach and tried unsuccessfully to have sex with her. Complaining that she had "tightened up on him," he then slapped the victim on the right buttock. Unable to complete the sex act with Jones, the Defendant suggested sex with April. She said that after the two of them undressed, Caughron rubbed the victim's blood on both their bodies as they engaged in sex on the floor beside the bed where Jones lay. Finally, April testified,

Caughron insisted that they drink some of the victim's blood from shot glasses that he produced for the occasion.

Although April's testimony was confused as to exact chronology, it appears that at some point, Jones was gagged to stop her screaming and tied up with the strips of towel and sheer material. April said that the Defendant tightened the terry cloth strip around Jones's neck, causing the victim to gasp. April testified that she then hit the victim in the head two times. After drinking the blood, April said, she went to the bathroom to throw up, but did not. When she returned to the bedroom, she saw the Defendant striking Jones's back with the pool stick. According to April, the Defendant dumped out the contents of Jones's purse as they left and took what appeared to be a large amount of money. Outside, she said, the Defendant used the knife he had given her to cut the telephone lines to make it appear that whoever had killed Jones had not wanted her to use the telephone.

April testified that she and the Defendant tried to wash the blood off their bodies in the river behind a store in Pigeon *532 Forge. They next drove to Dollywood, where they met several people, one of whom, Kevin Carver, threatened April with harm if she "got the Defendant in trouble."

Later that same morning, several witnesses saw the Defendant when he arrived at Settler's Village around 10:00-11:00 a.m. Caughron was wearing only cut-off jeans and tennis shoes; he had scratches on his back, stomach and face. Several witnesses saw what they described as dried blood on him. When April's mother commented that "he looked like some sort of wild woman got a hold of him the night before," he "sniggered" and said, "No, I just got in a fight over a beer in a bar in Newport." Caughron cleaned himself in the store's restroom. When Robert Yoakum, Cruze's boyfriend, teased the Defendant about the blood, Caughron told him that "a bitch had hit him in the head with a beer bottle." Caughron then took April aside and warned her not to tell what had happened. The two of them left the shops with Yoakum and went to April's mother's house, where the Defendant bathed. Later that day, Caughron spray-painted his car silver, as he told April, to prevent anyone who might have seen it the night before from identifying it.

Tom Bentley, who worked on the Defendant's car sometime after the killing, testified that he had used pieces of blue terry cloth towel from the trunk of the Defendant's car as grease rags. Bentley testified that the rags matched the towelling that he was shown at trial, which had been tied around the victim's body. When Bentley had asked the Defendant why he wanted to paint the car, Caughron replied, "Well, the lady that got killed, somebody might recognize it and I need to paint it."

Jimmy Lynn Huskey testified that in 1986, when he and the Defendant were friends, the Defendant had a pool stick that came apart like the one Ward had described and that Defendant kept light-colored lace table cloth or curtain material in his car similar to the sheer material used to tie up Jones. The Defendant had also talked to Huskey about tying up women during sex and said that "slapping them on the butt really turned him on."

Lettie Marie Cruze, April's mother, testified that she had sold the Defendant a silver ring with turquoise and coral inlay and a thunderbird design. This description matched that of the ring Christy Jones Scott had found in her mother's driveway after the killing. While the Defendant was staying at her house shortly after the murder, Cruze noticed that he had "an odd toothbrush for a man," a pink brush with a little rubber tip. Christy Jones Scott testified that her mother's toothbrush, a pink Oral-B brush, was missing after the killing.

The police made little progress in the investigation of the Jones homicide during the year after the homicide. They developed several leads, but none of them panned out. Then, on June 22, 1988, they took the first of six statements they would obtain from April Ward. In it, she disavowed any knowledge of the details of the murder, but made allegations that implicated Caughron, with whom she was no longer romantically engaged. During the summer of 1988, Caughron himself gave law enforcement officers various statements. In turn, he denied knowing the victim, denied any involvement in her death, and denied his actions the day after the killing. He also denied being in a fight in a bar in Newport and told different stories about how he had gotten scratched and bloodied up. Caughron said that he stayed at his grandmother's house on the night of the killing and had been riding around with a friend and his wife at the time of the murder. Over the course of these interviews, the Defendant became more and more nervous. One time when asked who had killed Ann Jones, Defendant stated, "Whoever done it needs help." Another time he said, "If I'm convicted of what I've done, someone will have to pay." When asked why he had tried to kill himself after one of the interrogation sessions with police, he said that "he was depressed and had a lot on his mind." At his last interview, when confronted with falsehoods in his prior statements, Caughron became upset and walked out of the room.

*533 Three inmates who had been incarcerated with the Defendant in the Sevier and Cocke County jails testified about statements that he had made to them concerning the victim and her death. When, in the summer of 1988, Tim McGaha had asked the Defendant if he had committed the murder, Caughron "just smiled." He told McGaha that he had been drunk and partying the night of the murder. He called the victim a "bitch." He also told McGaha he had lost a ring. Caughron told another prisoner, Roy Haynes, that on the night of the murder, he and his girlfriend had driven to a house on Cove Road or Cove Mill Road (the victim lived on Cole Drive) in Pigeon Forge and that from that point "he couldn't remember nothing ... he was so messed up on cocaine." The Defendant told Haynes that when he woke up the next morning he had blood all over him and that he did not know whether or not he had killed the victim. After looking at a newspaper article mentioning the homicide, the Defendant told Haynes that he thought his girlfriend was "snitching" on him. A third inmate, Bobby Floyd, testified that Defendant told him that the victim was a "bitch," who had threatened to "tell some girl's mother how old he was;" that the only evidence police had against him was an article of clothing with blood on it; and that

"the only mistake he [had] made was involving April."

The Defendant presented evidence that, based on evidence gathered at the crime scene, none of the tests or analyses performed by forensic scientists from TBI and the FBI had connected him with the killing. His fingerprints were not found in the house. A plaster cast of a shoe print found outside the house was consistent with a boot owned by Kenneth Ogle. Ogle had been a boyfriend of Teresa Goad, one of the victim's daughters. In September 1986, he had broken into the victim's home and at knifepoint had pushed Teresa to the bed and attempted to tie her hands with strips of sheet. Three witnesses testified that the Defendant was in the habit of spray painting his "junker" cars different colors. His aunt testified that, on the Friday night after he bought a green and white Oldsmobile, he came to his grandmother's house around 11 or 12 o'clock and went to bed.

Based on this evidence, presented over four days of trial, the jury found the Defendant not guilty of felony-murder, robbery, and larceny, but guilty of premeditated first-degree murder, first-degree burglary, and assault with intent to commit rape.

The sentencing phase of the trial was much briefer, primarily because the state presented no further proof and the Defendant called only four witnesses. The first was his aunt, Gladys Green, who told how his mother and father had divorced when the Defendant was three or four years old. According to Green, the Defendant's childhood had been very unsettled. She described her nephew as "slow" and said that he had a good attitude since he had been in jail.

Harold Stoffell, a minister, testified that the Defendant had accepted the word of God, was respectful and was "the finest young prisoner I've ever saw." Edward Moore, the jailer at the Sevier County Jail, testified that he had never had any "real problems" from Defendant while he had been in jail.

Dr. Madeline Pareau, a clinical psychologist, testified that Defendant's full IQ was 78, "just a little above mentally retarded classification." She said that he had been in special education classes, where he had done well. His father, whom Pareau described as "overtly psychotic," was an alcoholic and had physically abused his mother until their divorce. According to the history given by the Defendant, his mother had started acting "quite wild" after the divorce, drinking and dating. In Dr. Pareau's opinion, Caughron had received inadequate parenting, and there had been no consistency in his relationships. His stepfather, for example, had beaten him and humiliated him for bedwetting. Dr. Pareau felt that Defendant would not be a physical threat to society or other prison inmates. On cross-examination, however, she conceded that Caughron was not insane and could conform his conduct to the dictates of the law.

*534 I.

MOTION FOR CONTINUANCE

The Defendant first avers that the trial court abused its discretion in denying his motion for a continuance. Shortly before trial, the Defendant moved for a continuance on four grounds: (1) to take the testimony or deposition of George Tippens, an investigating officer who had moved to Florida; (2) to investigate additional suspects in the case whose names had been supplied to the defense on January 19, 1990; (3) to examine the door to the victim's bedroom; and (4) to permit FBI Agent Doug Dedrick to testify.

[1] It must be clearly shown that a trial court has abused its discretion in refusing to grant a continuance before that decision will be disturbed on appeal. *State v. Melson,* 638 S.W.2d 342, 359 (Tenn.1982). No abuse of discretion warranting reversal is shown in this case.

[2] Officer Tippens was one of the first officers on the scene the day the murder was discovered. The crucial evidence Defendant alleged Tippens possessed was his knowledge that there were groceries in the victim's truck when the body was discovered. This testimony, according to Defendant, would tend to show that the victim never had a chance to bring in her groceries before she died and thus was first attacked outside the house. Tippens was unable to come to trial because of a back condition. The trial court refused to continue the case because Tippens' testimony would be cumulative in light of the fact that there were several other investigating officers who should have possessed the same knowledge. At trial the Defendant elicited from Christy Jones Scott the testimony that she had unloaded two or three bags of laundry detergent from her mother's truck after she had found her mother.

[3] Regarding the need to investigate persons named as suspects in certain statements given to the defense by the State on January 19, 1990, the Defendant failed to show the materiality and relevance of any evidence such an investigation would yield. The Defendant has also failed to show that a different result would have been reached if the continuance had been granted. *See Baxter v. State,* 503 S.W.2d 226, 230 (Tenn.Crim.App.1973).

[4] On the allegations regarding the need to examine the bedroom door, the Defendant sought to show that the footprint on the door was larger than the Defendant's would have been. The door had been made available to the defense attorney for examination on January 26, three days before his motion. The trial court felt that the Defendant had failed to exercise due diligence in examining the door. Also, the point that Defendant wished to make, i.e., that the footprint on the door was not Defendant's, was explored during the testimony of Sandra Lee Paltorah, a forensic scientist at the T.B.I. specializing in shoe track analysis. Paltorah testified that the print on the door was consistent with a smooth-soled shoe as opposed to the tennis shoe worn by the Defendant.

[5] Finally, although the trial court denied the motion for continuance on the mistaken belief that FBI Agent Doug Dedrick would testify, Agent Dedrick's testimony was presented to the jury through stipulation. When it became apparent that Dedrick would not be at trial, defense counsel expressly stated he did not want a continuance because of the stipulation. We do not find that the

trial court abused its discretion in refusing to grant Defendant's motion for a continuance.

II.

ALLEGED T.R.CR.P. 26.2 ERROR

The Defendant avers that the trial court's denial of counsel's request for sufficient time to review the statements under Rule 26.2(d) constitutes reversible error.

The progenitor of Tennessee Rule of Criminal Procedure 26.2 is the 1957 decision of the United States Supreme Court in *Jencks v. United States,* 77 S.Ct. 1007, 353 U.S. 657, 1 L.Ed.2d 1103 (1957). In that case the Court held that defense counsel has a right to inspect prior statements or reports by a government witness, following *535 direct examination of the witness, to the extent that those reports or statements are related to the witness's testimony on direct examination, for the purpose of using them to prepare or conduct cross-examination. *Jencks* caused some controversy in the months after it was announced, centering on fears that it would force government prosecutors to turn over investigatory files, in their entirety, upon defense demand. To ensure against such an interpretation of the opinion in *Jencks,* the United States Congress enacted 18 U.S.C.A. § 3500, known from the time of its passage in 1957 as the Jencks Act. Its language was also incorporated into Federal Rule of Criminal Procedure 26. In Tennessee the right to inspect pretrial statements of a witness called to testify at trial, for the purpose of effectively cross-examining that witness, did not exist prior to the adoption of the Tennessee Rules of Criminal Procedure in July 1978. (FN1) This new production rule was initially included in Rule 16, which otherwise governs *pretrial* discovery and inspection, despite the fact that it involved "discovery" during trial and not before. Its misplacement in Rule 16 caused some confusion. *See, e.g., State v. Robinson,* 618 S.W.2d 754 (Tenn.Crim.App.1981).

In order to clarify the purpose and timing of the production of witness statements at trial, the provisions formerly contained in Rule 16(a)(1)(E) and (F) were recast as Rule 26.2 in 1984.

[6] Rule 26.2(a) states: " *After* a witness ... has testified on direct examination, the trial court, on motion ... shall order the attorney ... to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified." [Emphasis added.] Subsection (d) states that the court " *may* recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial." [Emphasis added.] The purpose of Rule 26.2 is to enable counsel to examine a witness's statements in order to test the credibility of that witness at trial. Our Court in interpreting Rule 26.2 has held that even in a capital case, the State is not required to produce witness statements until the conclusion of the witness's testimony on direct examination. *State v. Taylor,* 771 S.W.2d 387, 391 (1989). Today, for the first time, we address what constitutes a sufficient time to review Rule 26.2 statements.

It should be emphasized that this case does not involve the denial of Rule 26.2 statements. The statements here were produced the evening before direct and cross-examination took place the following afternoon. The sole issue is whether counsel was afforded a reasonable opportunity to examine the statements. The time needed for a reasonable examination is necessarily related to the length and complexity of the statements. In this case six statements, totaling 64 pages, were given to counsel for overnight study and reflection.

[7] Had April Ward been the State's first witness the morning of trial and had the State produced her statements *after* her direct examination, we are of the opinion that a two hour recess would have been adequate for counsel to properly prepare for cross-examination. Here, the statements were given to counsel the night before (7:15 p.m.) and cross-examination began at approximately 5 p.m., the next afternoon just short of twenty-two hours later. We are of the opinion that defense counsel, and his defense team, were given a reasonable opportunity to examine and prepare to use the statements in cross-examining April Ward.

[8] While neither state nor federal trial judges can require advance disclosure of statements, *U.S. v. Algie,* 667 F.2d 569 (6th Cir.1982) and *State v. Taylor, supra,* prosecutors *536 should nevertheless avoid needless delay by following the State's example here. We would strongly recommend early production of statements of witnesses in order to expedite the trial of the case and avoid lengthy recesses during trial. The District Attorney in this case provided defense counsel with April Ward's six statements at 7:15 p.m. on the evening before April Ward's testimony. This advance production satisfied the State's duty under Rule 26.2 and avoided the needless delay of the trial.

At 4:05 p.m. the next day, shortly before the conclusion of the direct examination of April Ward, counsel for Defendant asked the court to allow him to start his cross-examination the next morning. The trial court responded by pointing out that the defense team, consisting of attorneys Carl Ogle, Jr., Stephen Ward, and an investigator, had "had the statements overnight." The court denied counsel's request for another night in which to review the statements. The trial court wished to proceed, apparently to allow April Ward to finish her testimony that day. The court was presented with a young girl who had participated in a brutal, ritualistic-type murder, who repeatedly cried on the witness stand, and who required several recesses in order for her to regain her composure. The trial judge did not abuse his discretion by completing April Ward's testimony that afternoon.

III.

PHOTOGRAPHS AND VIDEOTAPE

[9] The photographs and the videotape taken at the murder scene are highly probative, in that they show the condition of the body and clarify oral testimony. These depictions are certainly not pleasant, but they are not shocking or gruesome. Under *State v. Banks,* 564 S.W.2d 947 (Tenn.1978), the trial court

did not abuse its discretion in permitting their introduction.

IV.

INTERRUPTIONS BY THE TRIAL COURT

[10] The Defendant next asserts that the trial court prejudiced Defendant's case by indicating to the jury throughout the trial that the court believed that the Defendant was guilty. The Defendant specifically complains of the trial court's interruption of his cross-examination of Christy Jones Scott and of Officer Sam Owenby, both of which interruptions were apparently attempts to keep the examination moving along; and of the court's statements during the cross-examination of Dr. Cleland Blake that what the doctor had told the jury was "just what he's told them" and that questions about why the doctor took fingernail clippings were academic and the answer obvious to anyone who had watched the television show *Quincy*. The Defendant also challenges comments by the court during the direct examination of T.B.I. scientist Robert E. McFadden to the effect that the record was "full of proof" that the bedroom door had been knocked off its hinges. This last statement was incorrect; but the proof elsewhere, including the photographs and McFadden's subsequent testimony as well as the court's own comments, made the mistake patent to the jury so that the Defendant could not have been prejudiced by the misstatement.

Finally, Defendant complains that the judge told the jury that they did not have to look at Ogle's boot and a full-scale photograph of the footprint on the door when these items were passed as exhibits. The Defendant says that the court was disparaging the Defendant's evidence. The record reveals, however, that the court was in the habit of telling the jurors that they did not have to look at potentially distasteful physical evidence, such as the cloth that had bound the victim, when it was passed to them. The boot comment was one episode of this behavior.

[11] It is axiomatic that a trial judge should exercise care not to express any thought that might lead the jury to infer that the judge is in favor of or against the defendant in a criminal trial. *Brooks v. State*, 187 Tenn. 67, 213 S.W.2d 7, 10 (1948). While we caution restraint in a trial court's interjections and comments ***537** during trial, in the overall context of this case, the trial court's behavior in the cited instances did not so clearly violate the mandate of impartiality as to infringe upon the Defendant's right to a fair trial. Furthermore, no prejudice has been shown. We find no reversible error. *See State v. Jenkins*, 733 S.W.2d 528, 532 (Tenn.Crim.App.1987); *State v. Howell*, 698 S.W.2d 84, 86-87 (Tenn.Crim.App.1985); *State v. Hardin*, 691 S.W.2d 578, 581 (Tenn.Crim.App.1985).

V.

DR. BLAKE'S TESTIMONY

[12][13] The Defendant next argues that Dr. Blake was not qualified to characterize the injuries on the victim's back as "whipping marks" and those on her buttock as a slap injury. The admission of expert testimony is largely in the discretion of the trial judge. *Arterburn v. State*, 216 Tenn. 240, 391 S.W.2d 648, 655 (1965); *State v. Taylor*, 645 S.W.2d 759, 762 (Tenn.Crim.App.1982). Dr. Blake was a board certified forensic pathologist in practice in that field since 1963. He had conducted 2500 forensic investigations. The trial court did not abuse its discretion in allowing Dr. Blake to give his opinions on what had caused these injuries. *See, e.g., Bryant v. State*, 539 S.W.2d 816, 819 (Tenn.Crim.App.1976).

VI.

STATEMENTS MADE BY VICTIM

[14] The Defendant insists that certain testimony of April Ward and her mother, Lettie Cruze, concerning statements made by the victim was inadmissible hearsay. The first such testimony objected to by Defendant was that of April Ward, to the effect that she was upset with Jones because of a conversation that Jones had had with her mother; that she was mad at Jones because "no one approved of us on the porch"; and that she hurt Jones because she hated her for going to her mother and trying to separate her from the Defendant. The trial court rejected the Defendant's hearsay objections on the grounds that any statements of the victim described by Ward were not offered for their truth but to show Ward's state of mind and what provoked her to harm the victim. We are in agreement with the conclusion of the trial judge that Ward's testimony, as it related to the victim's statements, was not hearsay inasmuch as it was not offered to prove the truth of the matter asserted. *See* T.R.E. § 801(c); *State v. Coker*, 746 S.W.2d 167, 173 (1987).

[15] Defendant's next objection was to the testimony of April's mother that the victim had told her that as a rule she did not get involved in other people's affairs but that she thought "April was a sweet little girl and she didn't trust Gary Caughron." Informing the jury that "[t]rue or untrue, you may consider that this conversation took place," the trial court overruled Defendant's objection. Again, the import of this testimony was that the conversation between April's mother and the victim occurred, not that the victim's statement was true. No hearsay was involved. The trial court did not err in admitting the testimony.

VII.

COMPETENCY OF WARD TO TESTIFY

[16] Defendant argues that the failure of the trial court to ask April Ward whether she understood the difference between telling the truth and a lie and whether she comprehended the importance of telling the truth rendered the competency evaluation conducted before she testified inadequate. Prior to trial, the court granted the Defendant's request for a competency hearing as to Ward, then seventeen, because she was a juvenile. At the hearing, the trial judge asked Ward some general questions, some questions about how she was doing in school and how her counseling was proceeding, and some questions about her awareness of her testimony. He then declared her competent to testify.

[17][18] Under T.R.E. 601, *see also* T.C.A. § 24-1-101, no one is automatically barred from testifying simply because of *538 age or mental status. (FN2) So long as a witness is of sufficient capacity to understand the obligation of an oath or affirmation, and some rule or statute does not provide otherwise, the witness is competent. The question of competency is a matter for the trial court's discretion. *Arterburn v. State, supra,* 391 S.W.2d at 657; *State v. Braggs,* 604 S.W.2d 883, 886 (Tenn.Crim.App.1980); *State v. Nelson,* 603 S.W.2d 158, 168 (Tenn.Crim.App.1980). The court did not abuse its discretion here.

VIII.

LEADING QUESTIONS

[19] The Defendant avers that the trial court erred in allowing the prosecution to ask leading questions of April Ward on direct examination. The State asserts that this issue should be treated as waived because, as the State correctly points out, the Defendant has failed to cite to the location in the record of the specific questions of which he complains. Our examination of the record shows at least five occasions when Defendant objected to the State's questioning of Ward as leading.

Some of the questions objected to were leading, some were not. T.R.E. 611(c) provides that "[l]eading questions should not be used on the direct examination of a witness except as to develop testimony." In D. Paine, *Tennessee Law of Evidence,* § 611.6 (2nd ed. 1990), the writers suggest that leading questions may be used to shorten the time needed for a witness to testify or to facilitate the direct examination of a young or otherwise impaired witness. Ward was a young and highly emotional witness and at times it was necessary to lead her "to develop" her testimony. Furthermore, there was no reversible error, if any, in failing to sustain the Defendant's objections since prejudice is not clearly shown. *See Hale v. State,* 198 Tenn. 461, 281 S.W.2d 51, 58 (1955); *Mothershed v. State,* 578 S.W.2d 96, 99 (Tenn.Crim.App.1978).

IX.

JIMMY HUSKEY'S TESTIMONY

[20] Defendant challenges the admissibility of Huskey's testimony that in 1986 the Defendant listened to hard rock music, drew sketches of "demons and stuff" like that on record album covers, had a pool stick that broke down into three pieces, had a light-colored tablecloth or curtain material in the back of his car, talked about tying up women during sex and told Huskey that slapping women "on the butt really turned him on." The State asserts, correctly under T.R.A.P. 3(e), that all of these alleged errors except that involving the Defendant's drawings of demons have been waived because of the failure to raise them in the motion for new trial.

[21][22] The Defendant argues that the evidence about his purported drug use, sexual practices, attachment to rock music, and drawing pictures of demons is evidence of other crimes, wrongs or acts, prohibited by T.R.E. 404(b). He also contends that this evidence was irrelevant. The testimony concerning the pool stick, the table cloth material, and slapping women on the buttocks was relevant to connect Defendant to this crime and corroborate the accomplice's testimony. The testimony involving drug use, "satanic" sketches and listening to rock music, while corroborating statements made by the accomplice, should not have been admitted but there is no harmful error under the facts of this record since April Ward's testimony had already presented these features of the Defendant's character.

X.

LETTIE CRUZE TESTIMONY

[23] The Defendant further complains that the trial court erred in admitting testimony *539 by Lettie Cruze that around the time of the murder, her daughter, April Ward, was having trouble in school and crying a lot. He also objects to Cruze's testimony that the Defendant "sneaked around" her house for some period of time after the murder. We find no error, although the relevance of this evidence is marginal. Testimony about April's emotional reaction to the murder tends to bolster her credibility, as does testimony about her continued contact with the Defendant.

XI.

RECALL OF CHRISTY SCOTT

[24][25] Over the Defendant's objection the trial court allowed the State to recall the victim's daughter, Christy Jones Scott, to testify that her mother owned a collection of shot glasses and a pink Oral B toothbrush. The evidence was relevant because of Ward's testimony about drinking the victim's blood from a shot glass and Cruze's testimony about the Defendant's pink toothbrush. Allowing the recall of a witness is left to the sound discretion of the trial judge, whose decision will only be disturbed upon a showing of abuse of discretion. *State v. Hartman,* 703 S.W.2d 106, 116 (Tenn.1985); *Lillard v. State,* 528 S.W.2d 207, 212 (Tenn.Crim.App.1975). There was no abuse of discretion here.

XII.

ATTEMPTED SUICIDE

[26] The Defendant complains that the court should not have allowed TBI Agent David Davenport and Detective Kenny Bean to testify about Defendant's attempted suicide because information about the attempt was part of a statement made by the Defendant but not supplied to the defense as required by T.R.Cr.P. 16(a)(1)(A). Agent Davenport did not testify about the attempted suicide. There is therefore no merit to this part of the issue. Detective Bean did testify that on August 25, 1988, when he asked Defendant why he attempted to kill himself after Davenport had initially talked with him about Jones's murder, Defendant replied that he was depressed and had a lot on his mind. The proof is ambiguous as to whether the State gave Defendant this statement under Rule 16. The State asserts that it did. It is not clearly established in the record that the State

violated Rule 16(a)(1)(A); but, if the State did violate the Rule, the Defendant has not shown any actual prejudice caused by failure to comply with the discovery order which would require exclusion of this evidence. *See State v. Payne,* 791 S.W.2d 10, 16 (Tenn.1990); *State v. James,* 688 S.W.2d 463, 466 (Tenn.Crim.App.1984).

XIII.

QUALIFICATIONS OF TWO JURORS

The record shows that juror Jerry McGill was related to State's witness John Brown by marriage. Brown was a patrolman with the Sevier County Sheriff's Department who had investigated the Defendant when he received a call on July 13, 1987, about Defendant's car being in a ditch. At trial, he testified that the Defendant appeared nervous and had a small cut on his face. Although the trial court told defense counsel that he could explore this situation "later at a proper time," counsel never did so.

[27] The second episode occurred when State's witness Tom Diddly recognized one of the jurors as the owner of the wrecker service that had towed Defendant's car when the witness worked on it. Again defense counsel indicated he would address any problem later but apparently failed to do so. Where a juror is not legally disqualified or there is no inherent prejudice, the burden is on the Defendant to show that a juror is in some way biased or prejudiced. *Bowman v. State,* 598 S.W.2d 809, 812 (Tenn.Crim.App.1980); *see also State v. Taylor,* 669 S.W.2d 694, 698-700 (Tenn.Crim.App.1983). Defendant has not done this and we find no error.

XIV.

JUROR'S COMMENTS

[28] The Defendant avers that the trial court erred in not declaring a mistrial because of a juror's comments. During ***540** cross-examination of April Ward, when defense counsel asked Ward why she had lied to law enforcement officers regarding whom she had told about the crime, a juror whispered loudly, "What's the difference?" No further mention was made of the episode until the next morning, when counsel indicated he would like to address it later that day; but no action was taken until just before the jurors began deliberations, when Van Helton, counsel's assistant, testified that the juror who had made the statement was Roy Hodge, an ex-constable, and that his manner was aggravated and "put out." Because there were questions about the juror's objectivity and the Defendant was at "enormous risk," the court removed the juror. Defendant requested no further action and did not request the court to declare a mistrial. The State asserts that the Defendant waived this issue.

[29] If the issue is not considered waived, there is no indication in the record and no reason to believe that the jurors who remained were prejudiced against the Defendant by the juror's remark, which was a comment upon counsel's repetitive questioning not upon the merits of the case. In the absence of proof to the contrary, it is assumed that all of the jurors who rendered the verdict were impartial and qualified and that a mistrial was not warranted. *See Graves v. State,* 489 S.W.2d 74, 81 (Tenn.Crim.App.1972).

XV.

TRIAL JUDGE'S ACTIONS

[30] The Defendant next avers that the trial court erred in unduly restricting his direct examination of T.B.I. Crime Laboratory personnel. The Defendant specifically cites to interruptions by the court occurring during defense counsel's direct examination of Robert McFadden, a fingerprint expert from the T.B.I. lab, who was Defendant's first witness. The defense sought to show that, despite a thorough and meticulous investigation, there was absolutely no evidence connecting Defendant with the crime scene. When defense counsel appeared to be developing this theory by an unnecessarily detailed examination of the forensic scientist, the trial court began interrupting to curtail what it considered irrelevant and unnecessary testimony. The court urged the defense counsel to move along by directing the examination to the evidence that was material and important for the jury to consider.

[31] It is well-settled that the propriety, scope, manner and control of the examination of witnesses is a matter within the discretion of the trial judge, subject to appellate review for abuse of discretion. *State v. Elliott,* 703 S.W.2d 171, 176 (Tenn.Crim.App.1985). The court in the present case, however, was unusually active in directing the form that questioning should take. The most serious episode of interjection occurred when the trial judge literally took over the questioning of the witness. Another interjection concerned McFadden's examination regarding whether the door was knocked off its hinges and has already been addressed in Section IV. A further complaint involves a bench conference at which the court urged the Defendant to get to the point before he exhausted the patience of the court and jury.

The trial judge's actions were unnecessary but did not deprive Defendant of a fair trial or prejudice him in any way. *See, e.g., State v. Jenkins, supra,* 733 S.W.2d at 532; *Pique v. State,* 480 S.W.2d 546, 550-551 (Tenn.Crim.App.1971). Defendant was not precluded from developing his theory, although it was not done in the detailed, point by point manner his counsel preferred; and the court did not prohibit any testimony that was shown to be relevant. Furthermore, the court's actions did not reflect the trial court's views on the Defendant's innocence or its opinion of the merit of Defendant's proof. We find no reversible error in the court's conduct during McFadden's testimony.

XVI.

IN CAMERA INSPECTION OF THE STATE'S FILE

Defendant filed a pretrial motion for the court to conduct an in camera inspection of ***541** the State's entire files, as well as the files of any agencies or individuals that had investigated the case for the State, and to determine if the State had failed to hand over anything that might be vital to the

preparation of the defense. The court was also requested to have copies of all these files sealed and filed for any appeal. At the beginning of trial the Defendant asked the court to inspect the files in camera to look for any possible exculpatory evidence. The court refused and pointed out that the district attorney general was aware of his ethical duties and stated that the court would look at anything the Defendant called to its attention but would not "plow" through all the files and evidence.

[32] Despite assertions that he had been informed that the State had failed and refused to disclose certain material, Defendant never requested the court to examine any specific document or evidence. The record does not support any allegation that the State has failed to comply with its duties under *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), or Rule 16, T.R.Cr.P. The trial court did not abuse its discretion in refusing to examine the State's files. *State v. Daniel,* 663 S.W.2d 809 (Tenn.Crim.App.1983), cited by Defendant, only indicates that an in camera inspection is necessary once it has been shown that there is material producible under Rule 16, in that case *Jencks* material.

XVII.

BENCH CONFERENCES

Defense counsel repeatedly asked to approach the bench prior to the testimony of certain State's witnesses to present motions *in limine* objecting to the admission of matters that might potentially come out during the witnesses' testimony. These were objections ordinarily made when and if the potentially objectionable testimony occurred. After allowing the Defendant to approach the bench prior to the testimony of Dr. Cleland Blake, April Ward, Jimmy Lynn Huskey, and Lettie Marie Cruze, when the State called witness Robert Yoakum, and defense counsel again approached the bench, the trial court refused to continue to "pre-review" the testimony, told defense counsel to object to questions as they were asked, and promised that it would then rule on the objections.

[33][34][35] With a few exceptions, *see, e.g.,* Tenn.R.Evid. 608 and 609, the trial court is given broad discretion in the timing of its decisions on the admissibility of evidence. D. Paine, *Tennessee Law of Evidence,* § 103.3 (2d ed. 1990). The trial court also has broad discretion in controlling the course and conduct of the trial. *Pique v. State, supra,* 480 S.W.2d at 550-551. Defense counsel was in effect asking the court as a regular practice, to speculate on the admissibility of evidence, without any idea of the context in which the evidence would be presented. The trial court did not abuse its discretion in requiring the Defendant to object when questions were actually asked.

XVIII.

STATEMENT OF KENNY PHILLIPS

[36] The Defendant alleges that the trial court erred in refusing to allow introduction of an extrajudicial statement made by one Kenny Phillips, an inmate at one of the state prison facilities, who was called as a witness for the defense. Phillips had given a statement to law enforcement officials on July 15, 1987, in which he stated that two persons, a man and a woman who were not the defendant and April Ward, had approached him about robbing and killing a woman in Pigeon Forge, possibly the victim Dorothy Ann Jones, although Phillips did not give the woman's name. The defendant also took a statement to this effect from Phillips.

When the time came for Phillips to testify, he refused because, he said, his earlier statements were lies concocted to get a reward offered for any evidence that would help solve Jones's murder. Phillips seemed to think that by testifying he would be risking a charge of perjury. Even though the trial court explained to him that as long as he testified truthfully he would not be committing perjury, Phillips refused to testify. ***542** The trial court held him in contempt. Defense counsel then argued that he should be allowed to read Phillips' previous statements into evidence because Phillips was "unavailable" under T.R.E. 804. Noting that the statements were admitted falsehoods, the trial court refused to allow their introduction.

The Defendant asserts on appeal that the statements should have been admitted because of constitutional considerations and cites *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), and F.R.E. 804(b)(5). *See also* Tenn.R.Evid. 804, Advisory Commission Comments. The hearsay statements sought to be admitted, however, bore none of the "persuasive assurances of trustworthiness" present in *Chambers, see* 410 U.S. at 302, 93 S.Ct. at 1048-1049 (confession made spontaneously to a close acquaintance soon after murder, corroborating evidence present, statement was self-incriminatory and unquestionably against interest). The Defendant asserts that Phillips' recantation is a lie, pointing out that no reward was being offered on July 15, 1987. With nothing more to go on than these allegations, the trial court did not err in excluding the statements.

XIX.

UNDUE EMPHASIS TO AGGRAVATING CIRCUMSTANCE

[37] At sentencing the trial court instructed as an aggravating circumstance: "The defendant allowed the victim to be treated with exceptional cruelty during the commission of the offense." This is not a statutory aggravating circumstance although it is similar to the circumstance in T.C.A. § 39-13-204(i)(5) [previously § 39-2-203(i)(5)]. After a recess, during which the jury went to lunch, the judge informed counsel that after reflection he had concluded that he should change the charge to conform more to the language of T.C.A. § 39-2-203(i)(5) requiring torture or depravity of mind and should define "cruel," "torture" and "depravity." Defense counsel did not object to a corrected charge. The jury, which had not begun deliberations, was called in; and the trial judge informed them that he was striking the charge on the first aggravating circumstance and inserting in place of it the instruction that "[t]he murder was especially cruel in that it involved torture or depravity of mind." The court next defined "cruel," "torture"

and "depravity" in accord with *State v. Williams,* 690 S.W.2d 517, 529-530 (Tenn.1985). Defense counsel then requested that the court also tell the jury that it had not changed the instruction simply to draw attention to that factor. The court therefore specifically instructed the jury that it had acted, not to emphasize that part of the charge, but to "comport exactly" with the law. There is no merit to Defendant's assertion that the trial court's actions drew undue attention to this part of the charge.

XX.

CLOSING ARGUMENT

[38] The Defendant avers that the trial court erred in not permitting him to make the final closing argument at sentencing. The statute, T.C.A. § 39-13-204(d), specifically grants the State the right of closing. This Court has previously found this issue meritless. *See State v. Melson,* 638 S.W.2d 342, 368 (Tenn.1982), *cert. denied,* 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983).

XXI.

DEATH QUALIFIED

The Defendant argues that questioning jurors about their beliefs on the death penalty biases the jury toward a finding of guilt and acceptance of the death penalty in violation of the Fifth, Sixth and Fourteenth Amendments to the United States Constitution and Article I, § § 8 and 9, of the Tennessee Constitution. Both this Court and the United States Supreme Court have rejected this and similar arguments. *See Lockhart v. McCree,* 476 U.S. 162, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); *State v. Coker,* 746 S.W.2d 167, 171 (Tenn.1987); *State v. McKay,* 680 S.W.2d 447, 450, 453-455 (Tenn.1984).

***543** XXII.

PROPOSED INSTRUCTION

[39] We find no error with regard to the trial court's refusal to instruct the jurors that they should presume that the sentence they assess will actually be carried out--that if a life sentence is imposed, a life sentence will be served and, likewise, that if the death penalty is assessed, the Defendant will be executed. This proposed instruction was rejected by the Court in *State v. Payne,* 791 S.W.2d 10, 21 (Tenn.1990), and *State v. Melson,* 638 S.W.2d 342, 367 (Tenn.1982), cert. denied, 459 U.S. 1137, 103 S.Ct. 770, 74 L.Ed.2d 983 (1983).

XXIII.

SUFFICIENCY OF EVIDENCE TO SUPPORT THE VERDICT

[40] The Defendant asserts that no evidence corroborates the testimony of April Ward, his accomplice. There is sufficient corroboration; *e.g.,* Jimmy Huskey's and Tom Bentley's testimony about the fabrics (blue terry cloth and lacy material) in the Defendant's possession; testimony of Defendant's appearance and behavior the morning after the murder; the presence of the turquoise ring at the victim's house; and Defendant's statements to his cellmates, Roy Haynes, Bobby Floyd, and Tim McGaha. *See State v. Henley,* 774 S.W.2d 908, 913 (Tenn.1989); *State v. Sparks,* 727 S.W.2d 480, 483 (Tenn.1987); *State v. Carter,* 714 S.W.2d 241, 244-245 (Tenn.1986).

XXIV.

SUFFICIENCY OF EVIDENCE TO SUPPORT AGGRAVATING CIRCUMSTANCE

[41] Citing *State v. Pritchett,* 621 S.W.2d 127, 139 (Tenn.1981), in which the victim died instantaneously from the first gunshot fired, the Defendant argues that the record does not support a finding that the Defendant tortured the victim before her death. He argues that Jones was unconscious during most of the acts that occurred that night. The proof shows that while Jones was alive and conscious, *see State v. Williams, supra,* 690 S.W.2d at 529-530, the Defendant told her that she was going to die as she begged for her life. He then struck her brutally and repeatedly about her head until, according to April Ward, she no longer moved. Dr. Blake's testimony was that the head injuries would have rendered her unconscious. It was April's testimony that it was only after the victim stopped moving that the other abuse occurred. The fact that the victim was tied and gagged, however, raises a question as to whether she was really unconscious during the subsequent abuse, as does the fact that she reportedly "tightened up" when the Defendant tried to achieve sexual penetration.

In any event, the proof shows that in addition to inflicting the head injuries, the Defendant tied Ann Jones to the bed, attempted to rape her (probably anally), beat her with a pool stick, slapped her buttocks so hard that an imprint of his hand was left on her skin, gagged and strangled her, and drank her blood after smearing it on himself and his accomplice, with whom he had sex as the victim lay dying nearby. These facts undeniably satisfy the definition of depravity of mind in *State v. Williams,* 690 S.W.2d at 529, and illustrate a "consciousness materially more 'depraved' than that of any person guilty of murder." *Godfrey v. Georgia,* 446 U.S. 420, 100 S.Ct. 1759, 1767, 64 L.Ed.2d 398 (1980).

Similar beating of a victim was held to support a finding of aggravating circumstance (i)(5) in *State v. Barber,* 753 S.W.2d 659, 668 (Tenn.1988); *State v. McNish,* 727 S.W.2d 490, 494 (Tenn.1987); and *State v. Cone,* 665 S.W.2d 87, 94-95 (Tenn.1984). In *State v. Groseclose,* 615 S.W.2d 142 (Tenn.1981), and *State v. Strouth,* 620 S.W.2d 467 (Tenn.1981), in which the victims were unconscious for part of the time, death penalties rendered under this aggravating circumstance were upheld.

In this case the proof vividly shows that this murder involved both torture *and* depravity of mind. The Defendant taunted the victim, despite her pleading, "Please don't hurt me," and told her she was going to die. The evidence fully supports the ***544** jury's finding of the aggravating circumstance in § 39-2-203(i)(5) (1982).

XXV.

CONCLUSION

We find no error in the guilt phase or sentencing phase of this case. In accordance with the mandate of T.C.A. § 39-13-206(c)(1)(D) [formerly T.C.A. § 39-2-205(c)(4)], we find that the sentence of death was not imposed in an arbitrary fashion, that the evidence supports the jury's finding of the statutory aggravating circumstance, and that the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance so found. Further, our comparative proportionality review convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the Defendant. *See State v. West,* 767 S.W.2d 387 (Tenn.1989); *State v. O'Guinn,* 709 S.W.2d 561 (Tenn.1986); *State v. Alley,* 776 S.W.2d 506 (Tenn.1989). This is one of the most brutal and sadistic killings this Court has reviewed. We are of the opinion that this senseless, and brutal killing clearly warrants the imposition of the death penalty. We therefore affirm the conviction of first degree murder and the sentence of death. The sentence will be carried out as provided by law on the 10th day of August, 1993, unless otherwise ordered by this Court or by other proper authority. Costs are adjudged against the Defendant.

O'BRIEN and ANDERSON, JJ., concur.

DAUGHTREY, J., and REID, C.J., dissent. See separate dissenting opinion.

DAUGHTREY, Justice, dissenting.

I believe that this case should be remanded for a new trial because of unwarranted interference with the defendant's right to due process--by the police, by the prosecution, and by the trial court. Hence, I respectfully dissent from the majority opinion.

The majority's recapitulation of the evidence in this case demonstrates that the testimony of the defendant's teenaged accomplice, April Ward, was not only crucial to the **state's** case against Gary **Caughron**, it *was* the **state's** case against him. The FBI developed no forensic evidence implicating Caughron, despite extensive testing on fingerprints, shoeprints, blood and other fluids, and fibers. The boot print on the victim's bedroom door established that someone other than the defendant had kicked in the door. Statements that Caughron made to friends and associates were incriminating to some extent, but for the most part were brief and ambiguous. These statements certainly would not support a murder conviction in the absence of April Ward's testimony.

The police department and the district attorney's office clearly understood April Ward's significance as a prosecution witness. But, at least initially, she was not a cooperative witness. Beginning in June 1988 with the first statement she gave police, and ending with the sixth and last one she gave them in November 1988, April Ward made a total of six pretrial statements, no two of which were completely consistent with each other.

From the beginning, the police and the prosecution sought to shield April Ward and the information she had given them from the defendant's attorneys. During the course of their investigation, the police directed April Ward's mother, Lettie Cruze, not to permit April to talk with defense counsel. Because April Ward was effectively under "house arrest" during the months immediately before trial, this directive cut off any access that defense counsel might have had to this crucial witness during his investigation of the case and preparation for trial.

In response to the defendant's pretrial " *Brady* motion"--seeking pretrial disclosure of material evidence favorable to the defense--the prosecutor failed to provide defense counsel with copies of April Ward's prior inconsistent statements. And when, finally, the prosecutor turned over copies of witness statements to the defendant's ***545** attorneys on the first night of trial, counsel was faced with the prospect of digesting over 100 pages, constituting the statements of 20 potential state witnesses, in the few hours before trial resumed the next morning. The next day, the trial judge refused to recess trial following April Ward's testimony on direct examination, despite counsel's representation that he had not had adequate time to review her pretrial statements and was unprepared to cross-examine her. As a result, defense counsel was not only prevented from gathering information that could have been developed from interviewing April Ward. He was also denied discovery of her statements prior to trial, and he was forced to conduct cross-examination of the state's crucial witness without the benefit of adequate preparation.

The trial court laid the blame for this predicament on the defendant's attorney. The majority here finds no error in the trial court's ruling. I conclude, to the contrary, that the combined action of the police, the prosecutors, and the trial judge operated effectively to deprive the defendant of his right to due process. (FN1)

Moreover, the cumulative prejudice resulting from the due process violations in this case, in which the defendant has been convicted and sentenced to death, cannot be written off as harmless error. While the defendant's lead attorney did cross-examine April Ward at trial, there is no way to measure how much more vigorous and effective his cross-examination might have been if he had been able to interview the witness in person prior to trial, or had been furnished with her prior inconsistent statements in response to his timely discovery motion, or had been given an adequate opportunity to review those statements *and* use them to prepare an effective cross-examination following her testimony on direct examination, all of which he was entitled to do under state and federal law and under our rules of procedure.

To use a colloquialism that summarizes the situation most descriptively, **Caughron's** attorneys were effectively "stonewalled" by **state** officials involved in the investigation and prosecution of this case. Without any realistic gauge with which to measure the extent of prejudice to the defendant as a result of the due process violations apparent in this record, I conclude that the only appropriate relief is to grant the defendant a new trial, at which the defense will have the benefit of the discovery and disclosure that it should have had prior to and during

the first trial. In reaching this conclusion, I do not wish to minimize in any way the wholly reprehensible nature of the homicide committed in this case, against an innocent and ultimately helpless victim. To insist on honoring the due process rights of the accused is an obligation imposed on courts and the judicial system by the state and federal constitutions. It in no way minimizes the heinousness of the guilty party's conduct.

I. POLICE INTERFERENCE WITH TRIAL PREPARATION

The due process violation in this case began with a police directive to April Ward's mother, Lettie Marie Cruze, not to let April talk to the defendant's counsel during the investigatory stage of this case. It was only the first in a series of efforts to thwart defense access to information about the case.

The due process implications of government interference with a defendant's right to interview potential witnesses may best be seen as a continuum, at one end of which is the active concealment of key witnesses. When a prosecutor deliberately conceals a material witness and the defense is thereby prejudiced, a due process violation results. *See, e.g., Freeman v. State of* ***546** *Georgia,* 599 F.2d 65, 69 (5th Cir.1979), *cert. denied,* 444 U.S. 1013, 100 S.Ct. 661, 62 L.Ed.2d 641 (1980); *Lockett v. Blackburn,* 571 F.2d 309, 313 (5th Cir.), *cert. denied,* 439 U.S. 873, 99 S.Ct. 207, 58 L.Ed.2d 186 (1978).

Falling somewhere along the continuum of cases illustrating prosecutorial interference with a defendant's right of access to witnesses are those cases in which a prosecutor has instructed a witness not to talk to defense counsel. The law is well-settled that prospective witnesses do not belong to either party, and for this reason neither side should suggest that a witness refrain from talking to opposing counsel. *Gammon v. State,* 506 S.W.2d 188, 190 (Tenn.Crim.App.1973); *United States v. Matlock,* 491 F.2d 504 (6th Cir.), *cert. denied,* 419 U.S. 864, 95 S.Ct. 119, 42 L.Ed.2d 100 (1974). Of course, a witness has the right to refuse to be interviewed. *Byrnes v. United States,* 327 F.2d 825, 832 (9th Cir.1964). Nevertheless, when the state instructs a witness not to talk to defense counsel and defendant's trial preparation is thereby hindered, or other prejudice results, due process may be violated.

For example, in *Gregory v. United States,* 369 F.2d 185 (D.C.Cir.1966), *remanded,* 410 F.2d 1016 (D.C.Cir.1969), *cert. denied,* 396 U.S. 865, 90 S.Ct. 143, 24 L.Ed.2d 119 (1969), the prosecuting attorney advised the witnesses to two robberies not to talk to anyone in his absence. The court stated:

> It is not suggested here that there was any direct suppression of evidence. But there was unquestionably a suppression of the means by which the defense could obtain evidence. The defense could not know what the eye witnesses to the events in suit were to testify to or how firm they were in their testimony unless defense counsel was provided a fair opportunity for interview. ....

Id. 369 F.2d at 189. The *Gregory* court, therefore, found that the state had prejudiced the defendant's pre-trial preparation and thereby deprived him of a fair trial.

In *Nichols v. State,* 581 So.2d 1245 (Ala.Cr.App.1991), the Alabama Court of Criminal Appeals reversed a conviction after the district attorney sent letters to prospective witnesses asking them not to discuss the case without a government attorney present. The court quoted *Gregory* at length, as well as *Gallman v. State,* 29 Ala.App. 264, 195 So. 768 (1940), to the effect that it is "a mistake of a serious nature for a trial court, or opposing counsel, to assume or intimate that counsel for the defendant is not at full liberty to question ... any person who knows or is presumed to know the facts [of the case]...." *Nichols,* 581 So.2d at 1249 (citing *Gallman,* 195 So. at 770). Based on this authority, "the serious nature of [the] case," and the witness's testimony that the prosecutor's letter influenced his decision not to talk to defense counsel, the court reversed the conviction and remanded the case for a new trial.

Another court recognized the potential for a due process violation when the state advised witnesses that they "couldn't or shouldn't" give statements to defense counsel. In *United States v. Peter Kiewit Sons' Co.,* 655 F.Supp. 73 (D.Colo.1986), a court ordered the witnesses to submit to depositions in order to cure the problem. That court noted that the witnesses were "particularly vulnerable to suggestion and anxious not to offend the prosecutors" because they were concerned that they, too, could be indicted. The court found it "grossly unfair" to permit this kind of prosecutorial misconduct, which had "unfairly hampered the defendants' investigation." *Id.* at 78. Both this case and *Gregory* are examples of courts perceiving the obvious hindrance to defense counsel's trial preparation when the state instructs witnesses not to talk.

Although instructing a witness not to talk with defense counsel may constitute a due process violation, some courts, emphasizing the requirement of prejudice, have found no constitutional error when the defendant does not appear to have been harmed by the misconduct. For example, in *Kines v. Butterworth,* 669 F.2d 6 (1st Cir.1981), *cert. denied,* 456 U.S. 980, 102 S.Ct. 2250, 72 L.Ed.2d 856 (1982), a state trooper instructed three witnesses, the correctional ***547** officers present after a prison assault, not to discuss the case with the defense attorney. However, the officers were not eyewitnesses; their testimony contained no surprises; counsel did not request a recess after the direct examinations; and cross-examination of the witnesses was thorough. The court, finding "nothing that unfairly affected or handicapped appellants in preparation for trial," held that due process was not violated because defendant could show no prejudice to his case. *Id.* 669 F.2d at 11.

In judging whether a defendant has been denied due process by the state's directive to a potential witness not to talk to defense counsel, the courts use an analysis much like that used in *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), governing the right to pretrial discovery of exculpatory evidence material to the issue of the defendant's guilt, discussed further in Section II. *infra.* The defendant must show that the state withheld favorable, material evidence and that its

suppression was prejudicial to the defendant's case. Courts will find prejudice, however, when defendant's pre-trial preparation is hampered by the inability of counsel to assess the credibility of witnesses. The courts also consider the other information available to defense counsel, such as pretrial statements, and they look for such indicia of prejudice as requests for recesses and poorly prepared cross-examinations. These factors contribute to what inevitably becomes a subjective assessment of the damage likely to have been done by the state's misconduct.

In this case, prejudice is clear. Unlike the government officials in *Freeman* and *Lockett*, the state prosecutor here did not physically conceal April Ward. The prosecution did, however, insist that she be kept at home and then took advantage of her vulnerability and fear of punishment by advising her mother not to let April discuss the case with the defendant's attorneys. The actual damage to defendant's trial preparation is incapable of qualitative assessment, but defense counsel's efforts to secure copies of April Ward's statement(s) prior to trial, as well as his repeated requests for time to review the statements provided to him the night before her direct examination, suggest that unlike the efforts of the attorneys in several of the cases discussed above, Caughron's counsel's efforts to defend his client were hampered by the complete lack of access to the state's crucial witness.

II. STATE'S REFUSAL TO SUPPLY BRADY MATERIAL

Of course, the prosecution might have overcome any prejudice caused by police interference with the defendant's efforts to prepare his defense, had the state produced April Ward's various conflicting statements in response to the defendant's motion for pretrial disclosure. Although there is no general right to discovery in a criminal trial, (FN2) the United States Supreme Court has held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland, supra,* 373 U.S. at 87, 83 S.Ct. at 1196-97. (FN3) While *Brady* contemplates the suppression of many types of exculpatory evidence, the Supreme Court has specifically held that evidence impeaching a government witness's credibility may be exculpatory within the meaning of *Brady*. *See Giglio v. United States,* 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972); *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985). Likewise, in *State v. Williams,* 690 S.W.2d 517, 525 (Tenn.1985), this Court held that "when the reliability of a witness may well *548 be determinative of guilt or innocence, the non-disclosure of evidence affecting his credibility may justify a new trial, regardless of the good faith or bad faith of the prosecutor." Moreover, the inconsistent statements of a witness are considered impeachment evidence favorable to a defendant. *See, e.g., United States v. Polisi,* 416 F.2d 573 (2d Cir.1969); *United States v. Shaffer,* 789 F.2d 682, 689 (9th Cir.1986). The witness to be impeached cannot, however, be one whose credibility does not affect defendant's guilt or innocence, a limitation that is clearly met in this case. *See generally United States v. Starusko,* 729 F.2d 256 (3d Cir.1984).

When asked to decide whether suppressed evidence is material, the courts have generally held that "the materiality of the withheld evidence may depend on the closeness of the case." *Carter v. Rafferty,* 826 F.2d 1299, 1308 (3d Cir.1987). *See also Boone v. Paderick,* 541 F.2d 447 (4th Cir.1976); *United States v. Sutton,* 542 F.2d 1239 (4th Cir.1976). For example, in *Starusko, supra,* the court found that the impeachment of a "key government witness" was material because "his credibility may well be determinative of guilt or innocence.... He is the linchpin of the prosecution's case." 729 F.2d at 260-61. Thus, a reviewing court must consider the materiality of the withheld evidence in light of the other evidence presented.

A due process violation requires more than the suppression of significant exculpatory evidence, however. The Fourth Circuit noted in *United States v. Smith Grading & Paving, Inc.,* 760 F.2d 527, 532 (4th Cir.), *cert. denied sub nom. Dellinger v. United States,* 474 U.S. 1005, 106 S.Ct. 524, 88 L.Ed.2d 457 (1985) (citing *United States v. Higgs,* 713 F.2d 39 (3d Cir.1983)), that "no violation occurs as long as *Brady* material is disclosed to a defendant in time for its effective use at trial." *See also United States v. McCrary,* 699 F.2d 1308 (11th Cir.1983). In *United States v. Darwin,* 757 F.2d 1193 (11th Cir.1985), the Eleventh Circuit faced a situation in which the government had disclosed impeachment evidence after a witness had testified. Noting the conclusions of the Seventh, Tenth, Third and Eighth Circuits, that court held that "[t]he point in the trial when a disclosure is made ... is not in itself determinative.... We agree with those circuits holding that a defendant must show that the failure to earlier disclose prejudiced him because it came so late that the information disclosed could not be effectively used at trial." 757 F.2d at 1201.

Although the complete non-disclosure of significant exculpatory evidence often makes an easy case for a due process violation, delayed disclosure requires an inquiry into whether the delay prevented the defense from using the disclosed material effectively in preparing and presenting the defendant's case. *United States v. Ingraldi,* 793 F.2d 408 (1st Cir.1986). In *Ingraldi,* by failing to move for a continuance and then thoroughly cross-examining the witness, the defense counsel cured a potential *Brady* violation. *Id.* 793 F.2d at 413. In *United States v. Enright,* 579 F.2d 980 (6th Cir.1978), the Sixth Circuit held that no due process *Brady* violation occurred because the failure to disclose material exculpatory evidence had been discovered in time for "full and adequate correction." Finally, in *United States v. Moceri,* 359 F.Supp. 431, 438 (N.D.Ohio 1973), the court reviewed an order requiring the government to show cause why it should not make a witness's prior statements available to the defense before trial. That court found that "only in the context of either a complete deprivation of discovery or resulting prejudice" does a due process violation occur. Only if the suppression prevents material exculpatory evidence from effectively being used at trial is there a due process violation. *See also United States v. Peters,* 732 F.2d 1004 (1st Cir.1984); *United States v. Higgs,* 713 F.2d 39, 44 (3d Cir.1983); *United States v. Xheka,* 704 F.2d 974, 981 (7th Cir.1983);

United States v. McPartlin, 595 F.2d 1321, 1346 (7th Cir.), *cert. denied,* 444 U.S. 833, 100 S.Ct. 65, 62 L.Ed.2d 43 (1979).

The record in this case indicates that despite the defendant's timely motion for disclosure, the prosecutor did not produce the inconsistent statements of April Ward, *549 the key witness for the state, until the night before she testified at trial. The evidence was clearly favorable to the defendant as impeachment evidence and also material to the issue of guilt, given the fact that the witness's testimony was the "linchpin of the case." Nevertheless, if defense counsel had been given an opportunity to make effective use of the material, that is, time to review those contradictory statements *and* time to prepare for April Ward's cross-examination based on what was contained in those statements, the due process problem in this case might have been avoided. Hence, both the due process violation by police in directing April Ward's mother not to let her talk to defense counsel, and the extenuation of that due process violation by the prosecutor in wrongfully withholding *Brady* material, could have been overcome in this case, had the trial court given defense counsel an adequate opportunity to review that material at an appropriate point during the trial. Unfortunately, in the name of expediency, that opportunity was not forthcoming.

III. THE RULE 26.2 VIOLATION

The majority opinion contains a brief history of Tennessee Rule of Criminal Procedure 26.2 and its genesis in federal law, and a passing reference to *State v. Taylor,* 771 S.W.2d 387 (Tenn.1989), the only reported decision of this Court directly interpreting Rule 26.2. *Taylor,* of course, stands for the obvious proposition that on motion, "a[ ] statement of the witness ... that relates to the subject matter concerning which the witness has testified" must be "produce[d] for the examination and use of the moving party," but only " *[a]fter* [that] witness ... has testified on direct examination." Tennessee Rules of Criminal Procedure 26.2(a) (emphasis added). Hence, under Tennessee law, as under federal law, a prosecutor's refusal to produce the statements prior to direct examination cannot be held to be prejudicial error, even though it is often extolled as "the better practice." *Taylor,* 771 S.W.2d at 391. The majority then correctly identifies the question of first impression we face in this case: Given the provision in Rule 26.2(d) permitting a "recess ... in the trial for the examination of such statement *and for preparation of its use in the trial* ", was counsel in this case afforded a reasonable opportunity to examine April Ward's prior statements and prepare for her cross-examination? (Emphasis added.)

Answering this inquiry in the affirmative, the majority postulates that because the defense "team" was given a copy of April's six statements "for overnight study and reflection," defense counsel had 22 hours in which to "study and reflect" on those 64 pages. In the majority's judgment, two hours would have been sufficient time to comply with the requirements of Rule 26.2. Thus, the majority concludes, the prosecution's "advance production satisfied the State's duty under Rule 26.2 and avoided the needless delay of the trial," and the trial court's decision "to proceed, apparently to allow April Ward to finish her testimony that day" was not an abuse of discretion. There was, in short, no violation of Rule 26.2 and thus no error, in the majority's view.

If this were a routine case, and if the majority's description of the problem posed for defense counsel in this case were more complete, one might not quibble with the decision to assign the matter to that legal limbo known as "trial court discretion." But this is not a routine case--it is a capital case, one in which the defendant was ultimately sentenced to execution, based entirely on the testimony of 16-year-old April Ward, an accomplice who had given police a total of six contradictory statements, all of which had been systematically withheld from defense counsel despite legitimate efforts, both informal and formal, to obtain them prior to and at the time of trial. To condone the trial court's action in the name of avoiding delay in the trial, or from some misplaced sympathy for the accomplice, is to make a mockery of the procedural guarantees expressed in our modern rules of procedure and in case law interpreting the reach of due process in criminal trials. At the very least, the majority should offer some guidance on the nature and extent of the trial court's discretion in this area of *550 the law and should set standards for determining when an abuse of that discretion has occurred.

A. *The Provisions of Rule 26.2*

The majority notes that the provisions of Rule 26.2 can be traced directly to Federal Rule of Criminal Procedure 26.2, which in turn was based on the federal "Jencks Act," 18 U.S.C. § 3500 (1957), passed in response to the United States Supreme Court's opinion in *Jencks v. United States,* 353 U.S. 657, 77 S.Ct. 1007, 1 L.Ed.2d 1103 (1957). In pertinent part, the Tennessee Rule reads as follows: (FN4)

Production of Statements of Witnesses.--

(a) Motion for Production. After a witness other than the defendant has testified on direct examination, the trial court, on motion of a party who did not call the witness, shall order the attorney for the state or the defendant and his attorney, as the case may be, to produce, for the examination and use of the moving party, any statement of the witness that is in their possession and that relates to the subject matter concerning which the witness has testified.

* * * * * *

(d) Recess for Examination of Statement. Upon delivery of the statement to the moving party, the court, upon application of that party, may recess proceedings in the trial for the examination of such statement and for preparation for its use in the trial.

(e) Sanction for Failure to Produce Statement. If the other party elects not to comply with an order to deliver a statement to the moving party, the court shall order that the testimony of the witness be stricken from the record and that the trial proceed, or, if it is the attorney for the state who elects not to comply, shall declare a mistrial if

required by the interest of justice....

Obviously, whether any one of these provisions has been violated and what action must be taken to correct the error can only be determined on a case-by-case basis, in context both the evidence in the record and the procedure followed at trial.

B. *Procedural History of the Rule Violation*

The factual background of the state's case against Gary Caughron is set out in detail in the majority opinion. It points out the obvious--that April Ward's testimony not only made her the prosecution's "linchpin witness," but also constituted virtually the entire case for the state. What is not *551 included in the majority opinion is a recitation of the procedural background of the trial, putting in context the "Jencks motion" made by defense counsel at various points during the proceedings.

The trial of this case lasted four days. The first day was consumed by arguments and rulings on unfinished pretrial business, including defense counsel's request that the trial court order early production of witness statements, and by selection of the jury. Sometime after court adjourned at 7:15 p.m., the district attorney handed defense counsel a package containing the pretrial statements of all prospective witnesses for the state, including April Ward. In the package were over 100 pages of typewritten and handwritten materials, comprising the statements of 20 different persons. Defense counsel apparently did not know until he received these documents from the prosecutor that April Ward had made six separate statements to police.

When court resumed the next morning at 9:00 a.m., the defendant's lead attorney, Carl R. Ogle, told the trial judge even before the first witness was called that he appreciated having received copies of the witnesses' statements the night before, but that he had not had a chance to review all the material that had been turned over to him. When, later that day, the state called April Ward as its fourth witness, Ogle told the trial judge that he had had time to review only one of April's statements and asked that trial be adjourned until the next morning to permit him to examine the rest of her statements before she testified. This request was denied, and April Ward's direct examination followed immediately.

Near the end of the direct examination, during a break in testimony taken to deal with an unrelated question, Ogle noted that it was 4:05 p.m.; he again reminded the trial judge that he had not had an opportunity to read all of April's prior statements; and he said, "I would ask the Court to allow me to start my cross-examination in the morning, because I am not prepared and there's no way in the world I can cross-examine this witness today." To this the trial judge responded:

> No sir. You have your assistant with you, Mr. Ward. You have your [investigator] with you ... They do a lot of work for you and do good work for you and they've been doing good work for you for the last ... since about 1:30. They've been looking at that. I glanced at it. It seems to have nothing worthwhile, relevant, or germane. You've had the statements overnight. This Court will not delay it but I will tell you this, I intend to quit about 5:00. Got a new rule. It may turn my hair brown again. My complexion may return. My vigor may return. I'm going to start working about eight or ten hours a day and quit.... I've been working 10, 12, 14 hours a day for the last three weeks and I shouldn't do that. So I'm going to try to do better and if we can let's do it. I know that I can't quit before 5:00. There's no way in the world I can do it but at 5:00 I'm going to start up [sic] and quit.

The jury was brought back to the courtroom, and the district attorney continued his direct examination of April Ward. Less than ten minutes later, he completed his questioning and tendered the witness to the defense for cross-examination. Ogle, noting that it was 4:12 p.m., again asked for an overnight recess. He reminded the trial judge that he had not received the package of statements until after court adjourned the previous night. He pointed out that he and his co-counsel had had to consult with their client and his family before leaving the courthouse at 9:15 p.m. to return to Ogle's office, which was located in Jefferson City, some 40 miles away in an adjoining county. They were due back in court in Sevierville at 9:00 the next morning. Ogle said that he had turned over the package of witness statements to his investigator to review overnight, and that he had been able to read only one of April Ward's statements in the interim. He apologized to the trial judge for having to ask for a recess, and indicated that the defense had tried to avoid the delay by seeking pretrial discovery of the witnesses' statements, an effort that had proved unsuccessful. When the trial judge responded *552 that he was "powerless to require the Attorney General to do something the rules and the law do not require," that is, to order early production of the statements, Ogle made the following, thoroughly reasonable response:

> But you could cure that [problem] at this point by giving me the amount of time necessary to properly prepare [for cross-examination. [T]his witness is the whole case. I mean, we rise or fall here if they believe her. It's that important. I've been in your court for a long time and don't regularly ask for this and you know that, but this is a very important case. It's a very dangerous situation for this witness to step in here without [my] being properly prepared to cross-examine her. It would just be suicide.

The trial judge denied defense counsel's request for a recess on the ground that the "material is not that complex. [The statements are] not that different [from each other]." After further discussion, during which the prosecution argued against further delay, the trial judge finally allowed counsel a ten-minute recess, which actually stretched into 16 minutes. Although the record does not show the exact time that court resumed following this recess, the hour must have been very close to 5:00 p.m., which was the trial judge's previously announced adjournment time. Nevertheless, the trial judge not only forced defense counsel to begin his cross-examination of April Ward at that late hour, but he also failed to recess until cross-examination was completed, some considerable period of time later that evening.

It is clear from the record that the trial court's

decision to deny a recess was not due to any misunderstanding on his part about the crucial nature of April Ward's testimony. Berating defense counsel for his repeated efforts to secure a recess, the trial judge said:

> I will give you a ten minute recess but you're going to cross-examine. But the court observes this. Before anybody came in the courthouse, before anybody got involved in this at all, even the most thickest neophyte in the world would know that [April Ward] is the crucial witness, the devastating witness and you knew, as an experienced, seasoned lawyer, from the front, throughout and now, this is the witness and this is the witness. And so, I hold you to that standard. I'll give you ten minutes to talk with whomsoever you want to. We're going to cross-examine this lady.

Following the brief recess, the trial judge added:

> Right now your client is at enormous risk for the death penalty. At enormous, enormous risk. Your statement that you weren't ready to cross-examine, if the death penalty is imposed, and it may well be. It's a jury question. Of course, this lawsuit's half-tried, and we don't know what course it will take or what proof is to come but at this time you are in imminent peril. You have put incompetency of counsel in this record by not being diligent, by not going over these statements and by not being prepared to cross-examine this crucial and devastating witness. That's what concerns the Court but the Court cannot stop and wait and procrastinate.

Before beginning an analysis of the legal principles applicable to these facts, two observations seem pertinent, both based on a careful reading of the transcript in this case. First, there is no reasonable basis in fact for the trial court's allegation that defense counsel had not been diligent, either in his representation of his client or in the discharge of his duties as an officer of the court. The trial court found as a matter of fact that the attorney had received the witness statements at 7:45 p.m. on the first night of trial. The lawyer was due back in court at 9:00 a.m. the next morning, approximately 13 hours later, ready for trial. In that 13-hour interval, he was called upon to confer with his client, to spend the patter part of two hours driving to and from his out-of-county office, to review the day's events with his co-counsel, to prepare his opening statement for the next morning, and to tend to such personal matters as eating, sleeping, and maintaining personal hygiene. To ask in addition that he read over 100 pages of witness *553 statements, including 64 pages of April Ward's statements, make a study of the many inconsistencies revealed in those statements, and devise a strategy for cross-examination based on his review, is simply unreasonable. The courts already demand much of attorneys appointed to represent indigent defendants, especially those who (like Caughron) face imposition of the ultimate penalty. Their efforts are unappreciated by the public generally and undercompensated by the justice system they serve. The burden they assume is difficult, and when acting in good faith, they should be accommodated by the courts in their efforts to discharge their professional obligation to their clients.

Second, despite the trial court's assessment of the statements in question as "not that complex," "not that different" from one another, and containing "nothing worthwhile, relevant or germane," a review of April Ward's statements demonstrates clearly that they were a powerful source of ammunition with which to impeach her testimony, had defense counsel been permitted the time necessary to review them and prepare his cross-examination in light of their content.

C. *Analysis of Relevant Case Law Interpreting Rule 26.2*

Although, as previously noted, there have been few Tennessee cases interpreting Rule 26.2, there is a rich mine of federal case law involving the production of what is now universally referred to as "Jencks material." While federal authority is not binding on Tennessee state courts, it is obviously persuasive in resolving disputes such as the one now before us, not only because the drafters of the Tennessee rule opted to follow the federal model so closely, but also because of the thoroughness the federal courts have brought to the analysis of Jencks disputes.

Like the Tennessee rule, the Jencks Act and the federal rule require not only that the defendant be furnished with the prior statements of witnesses following direct examination, but also that defense counsel be afforded a reasonable opportunity to examine those statements and prepare for cross-examination based on their contents. Although the duty of the trial court to order a recess under subsection (d) is couched in permissive terms, the federal cases make it clear that failure to permit counsel reasonable time for review constitutes error.

For example, in a case very close on its facts to the one now before us, the prosecution turned over Jencks material to defense counsel on a Sunday morning at 10:00 a.m., preceding the start of a three-day trial the next day, Monday. The material consisted of "a stack of paper at least eight inches thick, including a thousand pages of testimony obtained from ten witnesses, a forty-five minute tape recording and other documents." *United States v. Holmes,* 722 F.2d 37, 40 (4th Cir.1983). The record reflects that "it took an experienced attorney twenty-four hours to read through this material once in preparation for this appeal." (FN5) *Id.*

The facts of *Holmes* bear an almost uncanny resemblance to the facts in this case:

> The government completed the direct examination of its first witness, Creta, late in the afternoon of the first day of trial. One of the lawyers for the defense requested the district court to adjourn for the day [because] ... counsel had not sufficiently completed their study of the Jencks material so as to be prepared to cross-examine. The district court ruled that ... since the Jencks material had been furnished the day before, when under a strict interpretation of the Act it need not have been furnished until the witness had completed his direct testimony, the district court would give counsel only a five-minute recess before cross-examination would begin. [Footnote: In *554 fact, counsel

were given a sixteen minute recess. The record shows that the recess began at 4:40 p.m., and the jury did not return to the jury box until 4:56 p.m.] The requested adjournment was denied and cross-examination of Creta began. The court remained in session until the cross-examination, redirect and recross-examination of Creta was completed. The jury was excused at 6:51 p.m. and the court adjourned at 7:06 p.m.

Id.

The *Holmes* court held that it was "clear that defendants were not afforded a reasonable opportunity to examine and digest the mass of material furnished them on the Sunday before the Monday trial began." *Id.* at 41. The reviewing court found an abuse of discretion amounting to a violation of the defendants' rights under the Jencks Act and ordered a new trial. *Id.*

A similar error occurred in this case. When the trial judge refused to order a recess, as requested pursuant to Rule 26.2(d)--or even more reasonably, to adjourn court for the day a mere half-hour earlier than scheduled--he did so without justification. As a result, defense counsel was forced to begin cross-examination under circumstances amounting to a deprivation of Rule 26.2 statements that were rightfully his to inspect. The majority "emphasize [s] that this case does not involve the denial of Rule 26.2 statements." But, the production of Jencks material without adequate time to read and make use of it undoubtedly constitutes the functional equivalent of a denial. In my judgment, the violation of subsection (d) in this case is so clear that the only remaining question concerns the relief that should be granted in light of this error.

As one commentator has noted, once a Jencks statement is deemed producible, "the defendant's right to the statement is virtually absolute." *Wharton on Criminal Procedure.* (13th ed.) § 378. Because the original *Jencks* opinion was founded on the United States Supreme Court's supervisory powers, and not on constitutional grounds, a denial of that right does not, *per se,* result in constitutional error. *Palermo v. United States,* 360 U.S. 343, 345, 362, 79 S.Ct. 1217, 1221, 1229-30, 3 L.Ed.2d 1287 (1959). The federal courts have noted, however, "that in some situations denial of production of a Jencks Act type of statement might be a denial of a Sixth Amendment right." *United States v. Augenblick,* 393 U.S. 348, 356, 89 S.Ct. 528, 533, 21 L.Ed.2d 537 (1969). Hence, courts have suggested that both the Sixth Amendment's right to compulsory process, *Id.,* and the right to confrontation are implicated in the violation of the procedural guarantees of Rule 26.2. *Krilich v. United States,* 502 F.2d 680 (7th Cir.1974). As to the latter right, the United States Court of Appeal has noted:

> Clearly, the principal purpose of requiring the government to disclose prior written statements of a witness which relate to that witness' direct testimony is to facilitate cross-examination. It is principally through cross-examination that a defendant exercises his right to confront witnesses called to testify against him. Conversely, the failure to provide material to which the defense is entitled under the Jencks Act may adversely affect a defendant's ability to cross-examine a government witness and thereby infringe upon his constitutional right of confrontation.

Krilich, supra, at 682 (holding that a Jencks violation "presents an issue of sufficient constitutional dimension to warrant consideration under 28 U.S.C. § 2255").

Moreover, it has been held that the failure of an attorney to seek a recess for the purpose of reviewing recently proffered Jencks material (instead the defense attorney tried to read through the documents while direct examination was in progress) constitutes ineffective assistance of counsel, yet another Sixth Amendment deprivation. *United States v. Hinton,* 631 F.2d 769, 771, 778-780 (D.C.Cir.1980). The *Hinton* court faulted the attorney for failing to seek "adequate time to make an informed tactical decision as to the use of the information contained in the [statements]," thereby producing "a harried trial attorney, attending to direct examination with one part of her consciousness, and with the ***555** other rifling through the 'massive Jencks material' ... in a hurried attempt to isolate and scan the relevant documents." *Id.* at 778. In *Hinton,* the defense attorney was "harried" through her own fault, while in this case counsel was "harried" by the action of the trial court. The cause may be different, but the result is the same. Here, as in *Hinton,* counsel's conduct was not "the product of deliberate and informed decision" but is marked by "inadequate preparation," resulting in the deprivation of the defendant's right to the effective assistance of counsel. *Hinton, supra,* at 780.

Such a deprivation violates the right-to-counsel provision found in Article I, Section 9 of the Tennessee Constitution, as well as the Sixth Amendment of the federal constitution. *See generally Baxter v. Rose,* 523 S.W.2d 930, 936 (Tenn.1975). This constitutional violation is made all the more egregious by the fact that the trial court took note that it was imminent, but did nothing to prevent it. (FN6) Whatever value there is in maintaining efficiency in the trial of criminal cases (and it is considerable under normal circumstances), efficiency must be assigned a low priority where procedural rights of an accused are at stake. In this case, the trial judge's misguided decision not to adjourn court before 5:00 p.m., regardless of the circumstances, amounts to an arbitrary and capricious abuse of discretion, resulting in the necessity of retrial. Put simply, the price of saving less than a half-hour of trial time turned out to be "penny wise but pound foolish."

For there can be no dispute, given the facts of this case, that the error committed by the trial court was prejudicial. Federal case analysis on this point is compelling. The United States Supreme Court held early on that a *Jencks* violation could be considered harmless error. *Palermo, supra,* at 355-6, 79 S.Ct. at 1226-7. But in the wake of this initial ruling, the Court has set the threshold for determining harmlessness at a very high level. For example, in *Clancy v. United States,* 365 U.S. 312, 81 S.Ct. 645, 5 L.Ed.2d 574 (1961), the Court said:

> Since the production of at least some of the [Jencks] statements was a right of the defense, it is

not for us to speculate whether they could have been utilized effectively. As we said in *Jencks v. United States:* "Flat contradiction between the witness's testimony and the version of events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, or even a different order of treatment, are also relevant to the cross-examination process of testing the credibility of a witness's trial testimony."

Clancy, at 316, 81 S.Ct. at 648 quoting *Jencks, supra,* at 667, 77 S.Ct. at 1012-13 (citations omitted).

Building on its ruling in *Clancy,* the United States Supreme Court noted in *Goldberg v. United States:*

Since courts cannot "speculate whether [Jencks material] could have been utilized effectively" at trial, ... the harmless-error doctrine must be strictly applied in Jencks Act cases.

425 U.S. 94, 111, note 21, 96 S.Ct. 1338, 1348, note 21, 47 L.Ed.2d 603 (1967). The *Goldberg* court cited with approval Justice Brennan's dissenting opinion in *Rosenberg v. United States,* 360 U.S. 367, 373, 79 S.Ct. 1231, 3 L.Ed.2d 1304 (1959):

Although we need not go so far as those courts which have suggested that the harmless error doctrine can never apply to statements producible under the statute, ... fidelity to the principle underlying ***556** Jencks and the Jencks statute requires that when the defense has been denied a statement producible under the statute, an appellate court should order a new trial unless the circumstances justify the conclusion that a finding that such a denial was harmful error would be clearly erroneous. In that determination, appellate courts should be hesitant to take it upon themselves to decide that the defense could not have effectively utilized a producible statement.

Thus, federal law permits the courts to overlook Jencks violations only in the narrowest of circumstances: (FN7)

The requirements of the Jencks Act are intended to provide defendants in federal prosecutions with an opportunity for thorough cross-examination of government witnesses, making the constitutionally guaranteed right of confrontation more meaningful. Violations of the statute are necessarily attended by the danger that this precious right will be impaired. For this reason, and also because it is ordinarily difficult upon review of a cold record to ascertain the value to the defense of a statement withheld, *violation of the [Jencks] Act is excused only in extraordinary circumstances. Unless it is perfectly clear that the defense was not prejudiced by the omission, reversal is indicated.*

United States v. Missler, 414 F.2d 1293, 1303-1304 (4th Cir.1969) (citations omitted) (emphasis added). *Accord, United States v. Winner,* 666 F.2d 447, 448-449 (10th Cir.1981); *United States v. Knowles,* 594 F.2d 753, 755 (9th Cir.1979); *United States v. Aaron,* 457 F.2d 865, 869 (2nd Cir.1972).

Given the centrality of April Ward's testimony, the inherent unreliability which attaches to that testimony by virtue of the half-dozen contradictory statements she made over a five-month period prior to trial, and the trial court's failure to grant counsel a reasonable period of time in which to capitalize upon those various pretrial statements, it appears that the Rule 26.2(d) error in this case was prejudicial. Moreover, appellate judges are in a poor position to second-guess counsel on the question of whether a recess to permit full utilization of the statements in this case would have been efficacious. It should be noted, however, that perhaps the most ghoulish aspect of April Ward's testimony, to the effect that she and Caughron drank the victim's blood out of shot-glasses as she lay dying nearby, nowhere appears in any of Ward's prior statements, (FN8) a fact of which counsel may have been totally unaware, (FN9) since he had not had an adequate opportunity to read and compare all the statements.

It is true that defense counsel engaged in a vigorous cross-examination of April Ward, confronting her repeatedly with the fact that she had made contradictory statements to police. But, he did not cross-examine her with regard to the details of ***557.** those statements, perhaps as a matter of strategy, but more likely from ignorance of their contents. It is this latter possibility that should lead this Court to hold that the trial court's denial of counsel's request for a recess or a reasonable time to review the statements under Rule 26.2(d) constitutes reversible error.

Finally, it must be emphasized that the majority's calculation that defense counsel had *22 hours* in which to "study and reflect on the pretrial statements of April Ward" (and some 20 other witnesses) is purely illusory. It fails to take into account the fact that almost half this period of time, nine hours, was spent in court during the course of the trial. It makes no provision for two hours of travel, for time that the attorney spent consulting with his colleagues and his client, for time devoted to planning trial strategy for the next day (including opening argument), or for a reasonable period of time for rest and sustenance. The trial judge and a majority of this court apparently expect defense counsel to be able to prepare cross-examination from notes taken by an investigator (notes which the lawyer and the investigator may not have had a chance to discuss) while trial is actually in progress. Had the attorney done *voluntarily* what he was forced to do by the trial court in this case, there can be little doubt that he would be subject to a charge of incompetency and found to have rendered ineffective assistance of counsel--much like the attorney in *United States v. Hinton, supra,* who opted to review a witness's statement while direct examination of that witness was being conducted.

The physical and psychological demands on an attorney in trial, especially a criminal trial involving a capital offense, are heavy. The expectations placed on defense counsel in this case were completely unrealistic, and they resulted in a deprivation of due process with respect to his client. For the reasons set out above, I dissent from the majority's decision to affirm the defendant's

conviction in this case.

I am authorized to say that Chief Justice REID joins in this opinion.

(FN1.) T.C.A. § 40-2441, enacted in 1963, permitted pretrial discovery of a confession or statement against interest made by the accused. It did not provide for the production of statements by witnesses under any circumstances. T.C.A. § 40-2044, enacted in 1968, permitted pretrial discovery of documents, photographs, and tangible objects. Under caselaw interpreting this statute, discovery of statements by witnesses other than the defendant was not permitted. *See, e.g., Hudgins v. State,* 3 Tenn.Cr.App. 148, 458 S.W.2d 627 (1970).

(FN2.) T.C.A. § 24-1-101 was repealed in 1991 (Caughron was tried in 1990). Also, the language of T.R.E. 601 ("Every person of sufficient capacity to understand the obligation of an oath or affirmation is competent to be a witness except as otherwise provided in these rules or by statute.") has since been changed to "Every person is presumed competent to be a witness except as otherwise provided in these rules or by statute."

(FN1.) The action of the police in blocking pretrial access to the state's most crucial witness and the prosecution's failure to disclose summaries of her pretrial statements are not raised as discrete issues on appeal. For this reason, it would be necessary to hold that they constitute "plain error" in order to avoid a finding of waiver on the defendant's part and grant relief on either ground. However, they are treated in this opinion not as independent grounds for relief, but as due process violations that exacerbated the *Jencks* error in this case, making it obvious reversible error.

(FN2.) *Weatherford v. Bursey,* 429 U.S. 545, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977); *State v. Brownell,* 696 S.W.2d 362, 363 (Tenn.Crim.App.1985).

(FN3.) In *Brady,* the defendant requested the out-of-court statements of his companion during the murder. The government showed him all statements except the one in which the companion admitted the actual killing. Although this information would not affect the conviction, the jury's knowledge of the defendant's level of participation could have affected his punishment. 373 U.S. at 84, 83 S.Ct. at 1195.

(FN4.) As to the remainder of Rule 26.2, subsections (b) and (c) set out the procedure for determining whether the entire statement of a witness, or only part of it, is producible; subsection (f) requires application of the rule to pretrial hearings in the criminal court; and subsection (g) defines what constitutes a statement under the rule.

According to the Advisory Commission Comments:

"The language of Rule 26.2 is substantially identical to the language in Rule 26.2 of the Federal Rules of Criminal Procedure. There are, however, two other differences that deserve comment.

"First, as formerly was evident in Rule 16, the Committee deliberately did not incorporate that provision of subdivision (e)(3) of the Jencks Act, which applies to statements of witnesses before a grand jury, and such statements are not meant to be obtainable simply because a grand jury witness testifies for the State. Such statements may only be obtained under the limited provisions of existing law now contained in Rule 6(k)(2).

"Second, Rule 26.2(f) now makes it clear that this rule applies not only to trial situations, but also to pretrial testimony such as might be given at a suppression hearing. There would be little logic in requiring statement production only at trial, and not at pretrial hearings where testimony as to the facts of the case is being given under oath. This provision is similar to language found in Rule 12(i) of the Federal Rules of Criminal Procedure but the Tennessee Rules Commission elected to treat all witness statements in one rule. However, the Tennessee rule applies to all pretrial motions under Rule 12(b). Further, the Federal rule treats law enforcement officials as witnesses called by the state, but the commission elected not to adopt this provision. Obviously, Rule 26.2(c) applies to such pretrial motion hearings. Thus, only a part of a witness' statement may be relevant to *557. the hearing. The remainder may then be disclosed at trial under the provisions of Rule 26.2(a)."

(FN5.) Likewise, it took the author of this opinion a full hour to read rapidly through the statements of April Ward, without taking notes or marking the statements for comparison purposes. A careful reading would consume much more than the two-hour estimate given in the majority opinion. A list of the contradictions in the six statements and the development of a strategy for their effective use on cross-examination would, of course, take even longer.

*557_ (FN6.) Following the conclusion of April Ward's testimony, the trial judge attempted to rescue defense counsel from a later charge of ineffectiveness by commenting on the fact that Ogle had been handed "yellow sheets" of "check lists" by his investigator and noting, "I find counsel's assistance has been full, complete, meticulous as reflected by the questions put, as by the notes you should retain in case some question is raised at some later time about competency of counsel." Of course, no post-hoc pronouncement of competency by the trial court can make up for the fact that counsel was hobbled in his representation of Caughron by the denial of his motion for a Rule 26.2(d) recess.

(FN7.) The federal courts have held a Jencks violation harmless only where the statement and the witness's testimony are consistent, *United States v. Tashjian,* 660 F.2d 829 (1st Cir.1981); where the statement is of marginal value, because the witness is not an integral part of the government's case, *United States v. Weidman,* 572 F.2d 1199 (7th Cir.1978); where the statement contains only cumulative material, *i.e.,* it is the same as the information in grand jury transcripts that have already been disclosed, *United States v. Anthony,* 565 F.2d 533 (8th Cir.1977); where lost

notes would have supported the prosecution's case, *United States v. Miranda,* 526 F.2d 1319 (2nd Cir.1975), cert. denied 429 U.S. 821, 97 S.Ct. 69, 50 L.Ed.2d 82; or where the statement is not exculpatory and there was no advantage to the government in non-production, *United States v. Principe,* 499 F.2d 1135 (1st Cir.1974). At least one state court has applied harmless error analysis to the violation of production rule. In *State v. Tanner,* 175 W.Va. 264, 332 S.E.2d 277, 279 (1985), the Court held: "The question of whether the error was harmless or prejudicial hinges upon whether there was a substantial discrepancy between the contents of the prior statement or report and the witness's testimony during trial."

Obviously, the error in this case could not be considered harmless under any of the foregoing formulations.

(FN8.) And, no bloody shot-glasses were found at the scene of the crime.

(FN9.) There is no way to know to what extent this aspect of April's testimony may have affected the jury's decision to impose the death penalty. The record reflects that the state relied on it in arguing aggravating circumstances during the penalty phase of the proceedings.

*75 876 S.W.2d 75

Supreme Court of Tennessee,
at Knoxville.

STATE of Tennessee, Appellee,
v.
David Allen BRIMMER, Appellant.
Feb. 7, 1994.
Rehearing Denied May 2, 1994.

Defendant was convicted in the Anderson County Court, James B. Scott, Jr., J., of first-degree premeditated homicide and sentenced to death. Defendant appealed. The Supreme Court, O'Brien, J., held that: (1) evidence was sufficient for conviction; (2) evidence was sufficient to support finding of aggravating circumstance of murder in perpetration of robbery; and (3) death sentence was not disproportionate or excessive.

Affirmed.

Reid, C.J., filed concurring and dissenting opinion.

Daughtrey, J., filed opinion concurring in part and dissenting in part.

West Headnotes

[1] Criminal Law ⚿412.2(3)
110 ----
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(3) Informing Accused as to His Rights.

[See headnote text below]

[1] Criminal Law ⚿412.2(5)
110 ----
110XVII Evidence
110XVII(M) Declarations
110k411 Declarations by Accused
110k412.2 Right to Counsel; Caution
110k412.2(5) Failure to Request Counsel; Waiver.

Defendant's oral and written statements to police were not unlawfully obtained in violation of defendant's *Miranda* rights where defendant had acquired experience in procedures observed by law enforcement officers in soliciting accused to give his statement, was advised of his right to remain silent, and signed four waivers. U.S.C.A. Const.Amend. 5.

[2] Criminal Law ⚿486(6)
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k482 Examination of Experts
110k486 Facts Forming Basis of Opinion
110k486(6) Mental Condition.

Exclusion of testimony of doctor, who would have testified that defendant could have been coerced in making confession to police, did not deprive defendant of his constitutional right to present a defense in homicide trial where trial court found that basis for doctor's opinion was not sufficiently trustworthy to go to jury on issue as to who and what may have influenced defendant's mental state at time that he gave his confession and defendant was not deprived in any manner from showing the physical and psychological environment that yielded his confession. U.S.C.A. Const.Amend. 6.

[3] Criminal Law ⚿661
110 ----
110XX Trial
110XX(C) Reception of Evidence
110k661 Necessity and Scope of Proof.

It is well within authority of states to exclude evidence through application of evidentiary rules that themselves serve interest of fairness and reliability even if defendant would prefer to see that evidence admitted.

[4] Criminal Law ⚿1153(1)
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1153 Reception of Evidence
110k1153(1) In General.

Trial court's decision to admit or exclude expert testimony cannot be disturbed on appeal unless there is clear showing that trial court has abused its discretion.

[5] Criminal Law ⚿1169.11
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.11 Evidence of Other Offenses.

[See headnote text below]

[5] Criminal Law ⚿1171.1(3)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(3) Particular Statements, Comments, and Arguments.

Admission of testimony and argument in homicide trial to the effect that defendant had "killed before" did not constitute reversible error where defendant did not object when any of the remarks were made, defendant did not request trial court to instruct jury to disregard comments about other killings, state did not intentionally elicit remarks, and testimony clearly demonstrated defendant's mental condition as significant factor in determination of voluntariness of defendant's statements to police.

[6] Homicide ⚿253(6)
203 ----
203VII Evidence
203VII(E) Weight and Sufficiency
203k251 Degree of Murder
203k253 First Degree
203k253(6) Commission of or Attempt to Commit Other Offense.

Evidence was sufficient for conviction of first-degree premeditated homicide; defendant came to county with intent to rob and kill while armed with gun and knife, handcuffed victim to tree and choked

him to death with wire and slipknot.

[7] Criminal Law ⚖438(6)
110 ----
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(5) Depiction of Injuries or Dead Bodies
110k438(6) Purpose of Admission.

[See headnote text below]

[7] Criminal Law ⚖438(7)
110 ----
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(7) Photographs Arousing Passion or Prejudice; Gruesomeness.
Probative value of photograph of victim wearing watch found on his dead body and photograph of body of victim in hayfield where it was found outweighed photograph's prejudicial effect in homicide trial; defendant was not prejudiced by admission of photograph of defendant wearing watch and photograph of victim's body was probative to establish time of death by showing clothing victim was wearing at time of his murder.

[8] Homicide ⚖311
203 ----
203VIII Trial
203VIII(C) Instructions
203k311 Punishment.
Defendant was not entitled to jury instruction, as provided by capital sentencing statute, that aggravating circumstances should outweigh mitigating circumstances beyond a reasonable doubt; there was no constitutional requirement that state prove that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt before death penalty could be imposed and statute requiring requested instruction became effective after victim was murdered and there was no indication statute was to apply retroactively. T.C.A. § 39-13-204(g).

[9] Criminal Law ⚖1038.1(1)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1038 Instructions
110k1038.1 Objections in General
110k1038.1(1) In General.

[See headnote text below]

[9] Criminal Law ⚖1137(3)
110 ----
110XXIV Review
110XXIV(L) Scope of Review in General
110k1135 Parties Entitled to Allege Error
110k1137 Estoppel
110k1137(3) Instructions.
Defendant's failure to object to trial court's jury instruction and active procurement of instruction he later claims is erroneous precludes review of instruction on appeal.

[10] Statutes ⚖263
361 ----
361VI Construction and Operation
361VI(D) Retroactive Operation
361k263 Retrospective Construction in General.
Most statutes are presumed to operate prospectively unless legislature indicates contrary intention.

[11] Homicide ⚖311
203 ----
203VIII Trial
203VIII(C) Instructions
203k311 Punishment.
Defendant was not entitled to jury instructions in homicide trial on mitigating factor that murder was committed while defendant was under influence of extreme emotional disturbance, nor on mitigating factor that capacity of defendant to appreciate wrongfulness of his conduct or conform his conduct to requirements of law *75 was substantially impaired as a result of mental illness; although there was evidence that defendant was mentally ill, there was no evidence supporting a relationship between defendant's mental illness and the homicide.

[12] Homicide ⚖311
203 ----
203VIII Trial
203VIII(C) Instructions
203k311 Punishment.
Jury instruction in homicide trial as to meaning and function of mitigating circumstances was sufficient and appropriate where trial judge followed statute in delivering instructions and defendant was allowed to introduce such proof as he saw fit in mitigation.

[13] Homicide ⚖311
203 ----
203VIII Trial
203VIII(C) Instructions
203k311 Punishment.
Jury instruction in homicide trial that jury should have no sympathy or prejudice or allow anything but law and evidence to have any influence upon them in determining their verdict did not prevent jury from considering and giving effect to defendant's evidence in mitigation.

[14] Homicide ⚖311
203 ----
203VIII Trial
203VIII(C) Instructions
203k311 Punishment.
Jury instructions in homicide trial did not lead any juror to believe that he or she was precluded from considering any mitigating circumstances unless all jurors unanimously agreed on circumstances existence.

[15] Homicide ⚖341
203 ----
203X Appeal and Error
203k333 Harmless Error
203k341 Failure or Refusal to Give Instructions.
Trial court's error in failing to instruct jury on elements of robbery in penalty phase of homicide trial was harmless where trial court previously

defined robbery in its guilt phase instructions on felony-murder.

[16] Sentencing and Punishment ⚿1681
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 Killing While Committing Other Offense or in Course of Criminal Conduct.

(Formerly 203k357(7))
Evidence was sufficient to support aggravating circumstance of murder in perpetration of robbery; defendant came to area with intent to steal motor vehicle and, when he was unable to accomplish theft of acquaintance's car, he then victimized victim, whom he strangled during course of robbery.

[17] Sentencing and Punishment ⚿1681
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 Killing While Committing Other Offense or in Course of Criminal Conduct.

(Formerly 203k357(7))

[See headnote text below]

[17] Sentencing and Punishment ⚿1710
350H ----
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1710 Emotional Distress or Disturbance.

(Formerly 203k357(7))
Death sentence was not excessive or disproportionate to penalty imposed in similar first-degree premeditated homicides committed in course of robbery, despite fact defendants in similar cases did not suffer psychological impairment; trial court and jury gave due consideration to fact that defendant had significant psychological impairment stemming from abuse and neglect when he was child and found that it did not outweigh aggravating circumstance that defendant murdered victim during commission of robbery.

[18] Sentencing and Punishment ⚿1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.

(Formerly 110k1134(2))
In conducting proportionality review of defendant's death sentence, Supreme Court is not limited to using in comparison only those cases in which same aggravating factors are found; what is important is individualized determination based on character of individual and circumstances of the crime.

[19] Criminal Law ⚿723(1)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k722 Comments on Character or Conduct
110k723 Appeals to Sympathy or Prejudice
110k723(1) In General.
Prosecutor's statement during closing argument of homicide trial, that in order to impose life sentence, if jury found aggravating circumstances had been proved beyond a reasonable doubt, jury would have to find that mitigating circumstances outweighed aggravating circumstances, was accurate statement of law and did not impermissibly shift burden of proof.

[20] Criminal Law ⚿720(9)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k720 Comments on Evidence or Witnesses
110k720(7) Inferences from and Effect of Evidence in Particular Prosecutions
110k720(9) Homicide.
Prosecutor's statement during closing argument of homicide trial, "that there were no mitigating circumstances in the case and that Dr. Engum's testimony concerning the defendant should be entitled little weight," did no more than set out state's interpretation of proof and did not limit jury's consideration of mitigating factors.

[21] Sentencing and Punishment ⚿1780(2)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) Arguments and Conduct of Counsel.

(Formerly 110k723(1))
Prosecutor's statements during closing argument of penalty phase of homicide trial, urging jury that defendant must accept responsibility for his actions, did not mislead jury to believe that unless death penalty was imposed defendant was not being held responsible for his behavior; argument was attack on defendant's personal blameworthiness or culpability.

[22] Criminal Law ⚿723(1)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k722 Comments on Character or Conduct
110k723 Appeals to Sympathy or Prejudice
110k723(1) In General.
Prosecutor's statement during closing argument of homicide trial urging jury not to decide case on basis of sympathy for defendant was appropriate argument where comment was closely followed by admonition to jury to decide case on basis of law and facts.

[23] Criminal Law ⚿723(1)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k722 Comments on Character or Conduct
110k723 Appeals to Sympathy or Prejudice
110k723(1) In General.

[See headnote text below]

[23] Sentencing and Punishment ⚿1464
350H ----

350HVII Cruel and Unusual Punishment in General
350HVII(D) Prosecutions
350Hk1464 Arguments and Conduct of Counsel.

(Formerly 110k1213.3)
Prosecutor's statement in closing argument of homicide trial invoking memory of victim did not violate state constitutional provisions prohibiting imposition of punishment unless by jury of peers or prohibiting cruel and unusual punishment. Const. Art. 1, §§ 8, 16.

[24] Sentencing and Punishment ⚿1616
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1613 Requirements for Imposition
350Hk1616 Avoidance of Arbitrariness or Capriciousness.

(Formerly 110k1208.1(4.1))

[See headnote text below]

[24] Sentencing and Punishment ⚿1743
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)1 In General
350Hk1741 Notice of Intent to Seek Death Penalty
350Hk1743 Time for Giving.

(Formerly 110k1208.1(4.1))
Selection of defendant as candidate for death penalty was not arbitrary and capricious or result of abuse of prosecutorial discretion; there was nothing in record to support defendant's contention and fact that prosecutor had discretion to choose defendant did *75 not render death penalty unconstitutionally arbitrary.

[25] Homicide ⚿311
203 ----
203VIII Trial
203VIII(C) Instructions
203k311 Punishment.
Jury instruction that jury must agree unanimously in order to impose life sentence in penalty phase of homicide trial did not violate Eighth Amendment requirement that jury may not be required to find a mitigating circumstance unanimously before it can be considered; jury could not have imposed any sentence if it was not unanimous in its decision and if jury had not agreed as to defendant's punishment, life imprisonment would have been imposed. T.C.A. § 39-13-204(h); U.S.C.A. Const.Amend. 8

[26] Criminal Law ⚿872.5
110 ----
110XX Trial
110XX(K) Verdict
110k872.5 Assent of Required Number of Jurors.

(Formerly 110k8721/2)
There is no way jury can impose sentence if it is not unanimous in its decision.

[27] Sentencing and Punishment ⚿1612
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1612 Death Penalty as Cruel or Unusual Punishment.

(Formerly 203k356)
Provision of state constitution providing that state shall provide for humane treatment of prisoners did not add any additional restriction to use of death penalty beyond that imposed by prohibition against cruel and unusual punishment and, thus, as death penalty had been repeatedly upheld against cruel and unusual punishment challenges, imposition of death penalty was not unconstitutional. Const. Art. 1, § 32.

*77 Charles Burson, Atty. Gen. & Reporter, Merrilyn Feirman, Asst. Atty. Gen., Nashville and Jan Hicks, Asst. Atty. Gen., Clinton, for appellee.

J. Michael Clement, Clinton, J. Thomas Marshall, Dist. Public Defender, and Brock Mehler, Nashville, for appellant.

OPINION

O'BRIEN, Justice.

Defendant was found guilty of the first degree premeditated homicide of Rodney Compton, on or about 22 October 1989. The indictment included three statutory aggravating circumstances: (1) The murder was committed while defendant was engaged in committing a robbery; (2) the murder was committed for the purpose of avoiding lawful arrest; (3) the murder was especially heinous, atrocious or cruel. The jury found one (1) statutory aggravating circumstance: the *78 murder was committed while defendant was engaged in committing robbery.

The proof in this case shows that the victim, Rodney Compton, disappeared sometime after 6:30 p.m. on 22 October 1989. Compton had just returned from a cruise to the Bahamas and had failed to arrive, as planned, at his mother's home on the evening of his disappearance. Compton's body was discovered in a hayfield in rural Loudon County on 7 November 1989. He was dressed in the clothing he had worn when he returned from his trip on 22 October. Decomposition of the body prevented determination of the cause of death, but Compton's neck had been cut and the pathologist who had performed an autopsy on the body testified that suffocation and strangulation were potential causes of death.

On 3 February 1990, the defendant was arrested in Refugio, Texas, on charges unrelated to this case. He was driving Compton's pickup truck, in which officers found the victim's jacket and a pair of handcuffs. On 24 February 1990, the defendant confessed to law enforcement officers that he had killed Compton. He said that the victim had given him a ride in the truck on the evening of 22 October, and he admitted that he had intended to rob the victim at that time. The defendant claimed that, when the victim made sexual advances toward him, he told Compton he was a policeman and "arrested" and handcuffed him. The defendant said he had

driven Compton to another location where he choked him to death. The defendant stated he then drove to Loudon County, where he disposed of the body. While being transported to Tennessee from Texas, the defendant also identified the park in Anderson County where he had killed the victim.

Other proof established that the defendant had been in Anderson County at the time Compton disappeared, purportedly to see an acquaintance, David Parten. It was also shown that, when the defendant was seen a few days after Compton's disappearance, he had in his possession not only the victim's truck but also the victim's jacket and several souvenirs Compton had purchased in the Bahamas.

[1] Defendant has raised 13 separate issues, each of which are divided into multiple sub-issues. The first complaint is that his oral and written statements introduced into evidence were unlawfully obtained and admitted in violation of his constitutional rights.

At the conclusion of a motion to suppress his written and oral admissions, the trial judge took the matter under advisement and subsequently issued an order denying the motion in which he held that defendant was advised of his constitutional rights to remain silent and that he knowingly and voluntarily waived those rights. Based on the totality of the circumstances he overruled the motion to suppress the statements. He made certain findings of fact, stating in pertinent part, that, in conjunction with his previous criminal record, defendant had acquired experience in the procedures observed by law enforcement officers in soliciting an accused to give his statement. He found that the police took care to inform defendant of his rights and took care to see that he understood them. He further found defendant had signed four (4) waivers, although some were signed with false names. The court did not find defendant to be a credible witness.

Defendant makes the same charges here. We are constrained to say that defendant's brief is very difficult to follow due to innuendo and incomplete citations to the law in a seeming effort to convey the impression that the citations are authority for the point to be made. His claim that he was denied the right to counsel and the claims that he was held for 22 days in solitary confinement and refused medical attention when requested were refuted by the law enforcement officers involved. There is no evidence in the record, other than being kept apart from the other inmates, that defendant was subjected to any other potentially coercive treatment. He says he asked for a doctor, but never stated that he was subject to any need for medical attention. To bolster his argument, defendant says the trial court's ultimate conclusion that his confession was voluntary was made without the benefit of hearing the testimony of Dr. Eric Engum during the jury-out sentencing hearing. No effort was made at the suppression hearing to present the testimony *79 of the doctor. The United States Supreme Court case of *Colorado v. Connelly,* 479 U.S. 157, 164, 107 S.Ct. 515, 520, 93 L.Ed.2d 473 (1986), is cited for the statement "as interrogators have turned to more subtle forms of psychological persuasion, courts have found mental condition of the defendant a more significant factor in the 'voluntariness' calculus." (FN1) The complete statement continues, "but this fact does not justify a conclusion that a defendant's mental condition, by itself and apart from its relation to official coercion, should ever dispose of the inquiry into constitutional 'voluntariness'."

The *Connelly* case stands for the proposition that coercive police activity is a necessary predicate to finding that a confession is not voluntary within the meaning of the due process clause and that the State need prove waiver of *Miranda* rights only by a preponderance of the evidence. In stating those principles the Court reminds us that "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence," citing *Delaware v. Van Arsdall,* 475 U.S. 673, 681, 106 S.Ct. 1431, 1436, 89 L.Ed.2d 674 (1986), and further comments that while the exclusion of evidence may be necessary to protect constitutional guarantees, both the necessity for the collateral inquiry and the exclusion of evidence deflect a criminal trial from its basic purpose. The trial court in this case properly applied the "totality of the circumstances" rule and there was no violation of either federal or state constitutional rights in the admission of defendant's oral and written statements, including the oral statement made to the police officer who returned him from Texas to Tennessee.

[2][3][4] Equally without merit is defendant's insistence that the exclusion of Dr. Engum's testimony at the guilt phase of the trial violated his constitutional right to present a defense. He cites *Crane v. Kentucky,* 476 U.S. 683, 687, 106 S.Ct. 2142, 2145, 90 L.Ed.2d 636 (1986), for the statement that "evidence surrounding the making of a confession bears on its credibility as well as its voluntariness." The exclusion of this evidence does not rise to a deprivation of defendant's right to present a defense under *Crane,* supra. In that case the defendant was completely foreclosed from offering any evidence at all concerning the circumstances of his confession. Dr. Engum's testimony was to be, that after listening to a 30-minute tape of defendant's interrogation by police officers when he confessed to the homicide, he believed with a reasonable degree of certainty that defendant was an individual who very plausibly could have been coerced. The trial judge denied the admission of this testimony to the jury. He ruled that the information elicited by the doctor from the tape was only a part of the interrogation procedure in which defendant confessed. He found that the basis for the doctor's opinion was not sufficiently trustworthy to go to the jury on the issue as to who and what may have influenced defendant's mental state at the time that he gave his confession. He further ruled that the doctor's testimony would be available in the sentencing phase of the proceedings in the event defendant was found guilty. Defendant was not deprived in any manner from showing the physical and psychological environment that yielded his confession. It is well within the authority of States to exclude evidence through the application of evidentiary rules that themselves serve the interest of fairness and reliability--even if the defendant would prefer to see that evidence admitted. *Crane, supra,* 476 U.S. at 689, 106 S.Ct. at 2146. A trial court's decision to admit or exclude expert testimony cannot be disturbed on appeal unless there is a clear showing that the trial court has abused its discretion. *State v. Hawk,* 688 S.W.2d 467, 472

(Tenn.Cr.App.1985). We find no such abuse in this case.

[5] Defendant says it was a denial of his right to due process and that he was prejudiced by the erroneous admission of testimony and argument that he had "killed before." A review of that part of the proceedings where this testimony occurred is essential to a resolution of this issue. While describing the circumstances of defendant's confession, the sheriff of Refugio County, Texas, where defendant had been apprehended, testified ***80** that he had been talking with defendant and was of the opinion defendant was pretty close to the place where he really wanted to talk about the Compton homicide. He decided to postpone any further inquiry and sent for the jailer to take defendant back to the jail. The jailer and defendant left the office and were gone approximately 30 seconds to a minute when they returned. The jailer said that Mr. Brimmer wanted to talk to the officers. It was the sheriff's testimony, "we talked to him, and he said that he did kill this Mr. Compton and that the reason--I had told him that I felt like he had killed before and that was the reason he was holding back, because he didn't want to tell about everything. And so he said, yeah, you're right. I have killed before, and I did kill Mr. Compton."

Defendant also complained of testimony of Sheriff Hodges relating to his confession which occurred after they had taken a lunch break. The sheriff testified the interview with defendant continued over "probably two (2) to three (3) hours, because we did break for lunch and let him compose himself a little bit. He was pretty emotional." The sheriff testified that after the lunch break defendant was no longer crying and it got a lot better. Initially, after he came back with the jailer, he started answering the questions. Sheriff Hodges related that "the more we got into it, you know, it was catching up with him and, like I say, he was just unloading and he had this burden that was bothering him a lot about this murder and some others."

A further protest was to the State Attorney's final argument when she quoted Sheriff Hodges' comment, "Son, you killed before."

Our investigation of these complaints indicates initially that the issue was waived. There was no contemporaneous objection when any of these allegedly objectionable remarks were made. Defendant did not request the Court to instruct the jury to disregard comments about other killings. The record indicates that Sheriff Hodges was not being responsive to the State's questions when the reference to prior killings was made. There is no indication the State intentionally elicited these remarks. Moreover, this issue was not raised on the motion for new trial. Certainly it would have been better if none of the remarks had been made; however, defendant cannot on one hand complain that in excluding Dr. Engum's testimony defendant was stripped of the power to describe to the jury the circumstances that prompted his confession and, on the other, complain about the admission of evidence which clearly demonstrated his mental condition as a significant factor in determination of voluntariness. Under the circumstances and evidence in this case we do not think these incidents constitute reversible error. We note that defense counsel as well as the Attorney General made inquiry with regard to the circumstances under which the confession was made.

[6] Defendant contends the evidence adduced at trial was insufficient to support a finding by a rational trier of fact that the victim was killed intentionally, with malice, deliberation and premeditation. These contentions are not sustained by the record which clearly shows that defendant handcuffed the victim to a tree and choked him to death with a wire and slipknot. Defendant said first, that he did not intend to kill the victim, and second, that he committed the homicide because he became angry when the victim confessed he had sexually abused children at the school where he worked. There is evidence in the record to the effect that defendant came to Anderson County with the intent to rob and kill David Parten. He was armed with a gun and a knife. Fortuitous circumstances thwarted this course of action and brought the ultimate victim into defendant's path. The jury could reasonably assume that a theft and killing had been defendant's intent from the beginning. Only the victim changed. The substitution of a garrote as the instrument of death did not diminish the intent, the premeditation, or the deliberate homicide.

Defendant raises inferences of conflict in the evidence and testimony which, he claims, justified a directed verdict. We think not. The trial judge submitted the case to the jury and approved their verdict, thus accrediting the testimony of the State's witnesses and resolving all conflicts in favor of the State. Under the evidence in this record any ***81** rational trier of fact could have found beyond a reasonable doubt that the defendant killed the victim and that the killing was malicious, premeditated and deliberate. *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979); T.R.A.P. 13(e).

We note that the trial court instructed the jury that "intent or desire to kill may be conceived and deliberately formed in an instant." This instruction, which was in accord with the case law at the time it was given, has been discussed at length in the recent case of *State v. Brown,* 836 S.W.2d 530 (Tenn.1992). What the Court said in *Brown* was, "[It] is now abundantly clear that the deliberation necessary to establish first degree murder *cannot* be formed in an instant. It requires proof, as the sentencing commission comment to § 39-13-201(b) further provides, that the homicide was 'committed' with 'a cool purpose' and without passion or provocation, which would reduce the offense either to second degree murder or to manslaughter, respectively.' We conclude that the evidence in this case meets the *Brown* standard for premeditation and deliberation.

[7] Defendant says the trial court erred by allowing certain irrelevant, prejudicial and misleading photographs of the victim to be introduced into evidence. He says the photographs which were entered into evidence were irrelevant, cumulative, and a waste of time. He cites the appropriate rules of evidence and *State v. Banks,* 564 S.W.2d 947, 949 (Tenn.1978) as authority. Several photographs are specifically objected to. The first is Exhibit 6 which is a picture of the victim during his lifetime wearing a watch similar to that found on his dead

body. The watch also was introduced into evidence. While the relevance of this photograph is minimal, it certainly did not prejudice the defendant in any manner. The second photograph depicts the body of the victim in a hayfield where it was found. The picture was offered in evidence to establish the time of death by showing the clothing he was wearing at the time of his murder. The probative value of this Exhibit was not outweighed by any of the factors enumerated in Evidence Rule 403. We are of the opinion it was properly admitted. There is some suggestion that there was an objection to the admission of Exhibits numbered 18.3 through 18.6. The record shows that the Court, in referring to collective Exhibit 18, denied the admission of these exhibits to the jury in any form. We find the issue without merit.

Defendant has made a complaint that the trial court erred by allowing the State to violate a preliminary order requiring counsel to approach the bench prior to introducing any photographs of the victim's body. This complaint is totally without merit. The record contains no evidence of defendant's allegations of violation of the court's ruling by the State's counsel. The trial court expressly found there was no breach of its ruling in spirit or by communications to the jury.

[8] We find defendant's complaints in reference to the trial court's instructions to the jury to be without merit. Defendant asserts that the trial judge erred in not instructing the jury that aggravating circumstances should outweigh mitigating circumstances beyond a reasonable doubt. Defendant refers to T.C.A. § 39-13-204(g) (FN2) enacted by Ch. 591, Pub. Acts 1989, effective 1 November 1989, which amended the statute to require the jury to determine that any aggravating circumstances found to be proven by the State must outweigh any mitigating circumstances *beyond a reasonable doubt* in order to impose a death sentence. Prior to the enactment of Chapter 591, the statute only required the jury to determine that any aggravating circumstances were not outweighed by any mitigating circumstances and did not include the reasonable doubt provision. The offense for which defendant was convicted occurred before the effective date of the 1989 amendment, but the defendant was tried and sentenced after the effective date of that Act. The import of defendant's argument is that the 1989 amendment should have been applied to his case despite the fact the offense occurred before its effective date.

We initially point out that the defendant submitted a requested instruction as follows:

> *82 If you find that one or more aggravating circumstances exist, you cannot sentence the defendant to death unless you find that these aggravating circumstances outweigh the mitigating circumstances. Mitigating circumstances need not be *proved beyond a reasonable doubt,* but proof by a mere preponderance of the evidence is sufficient.

It is apparent this instruction omitted the reasonable doubt standard defendant now asserts was required. The trial court expressly told counsel that he would charge the first sentence but not the second. The instructions as given were not objected to at trial nor was the issue raised on motion for new trial.

[9] Normally, defendant's failure to take any action to call this issue to the trial court's attention and his active procurement of an instruction he now claims is erroneous would preclude review on appeal. *See* T.R.A.P. 3(e) and 36(a). In the present case, however, if defendant was tried under law inapplicable to his case, his substantial rights may have been affected. Under these circumstances we exercise our discretion to review this issue in order to insure substantial justice is done. *See* T.R.Cr.P. 52(b).

[10] This Court has previously held that there is no constitutional requirement that the State prove that aggravating circumstances outweigh mitigating circumstances beyond a reasonable doubt before the death penalty may be imposed. *See State v. Payne,* 791 S.W.2d 10, 20-21 (Tenn.1990); *State v. Boyd,* 797 S.W.2d 589, 597 (Tenn.1990). The defendant's right to a "reasonable doubt" charge therefore must depend on the 1989 Act. Thus, the question presented is whether the General Assembly intended that the amendments to the capital sentencing statute apply to cases arising before but tried after the effective date of amendment. Most statutes are presumed to operate prospectively unless the legislature indicates a contrary intention. *Cates v. T.I.M.E. DC, Inc.,* 513 S.W.2d 508, 510 (Tenn.1974); *Morford v. Yong Kyun Cho,* 732 S.W.2d 617, 620 (Tenn.App.1987); *see also United States v. Rewald,* 835 F.2d 215, 216 (9th Cir.1987); *State v. Sutherland,* 248 Kan. 96, 804 P.2d 970 (1991). We have found no retroactivity clause either specifically or expressly applicable to the 1989 amendments to the capital sentencing statute.

T.C.A. § 39-11-112, enacted as § 1 of Chapter 591 of the 1989 Acts, states specifically:

> Repealed or amended laws--Application in prosecution for offense.--Whenever any penal statute or penal legislative act of the state is repealed or amended by a subsequent legislative act, any offense, as defined by the statute or act being repealed or amended, committed while such statute or act was in full force and effect *shall be prosecuted under the act or statute in effect at the time of the commission of the offense.* Except as provided under the provisions of § 40-35-117, in the event the subsequent act provides for a lesser penalty, any punishment imposed shall be in accordance with the subsequent act. [Acts 1989, ch. 591, § 1.] (Emphasis supplied.)

T.C.A. § 40-35-117, enacted as Ch. 591, § 6, Pub. Acts 1989, and a part of the Criminal Sentencing Reform Act of 1989, provides in subsection (b) for the sentencing of persons for offenses committed between 1 July 1982 and 1 November 1989 under the 1989 Act except where constitutionally prohibited. Sentencing Commission Comments to T.C.A. § 40-35-117 and 118, however, indicate that first degree murder is excluded from the provisions of these sections. We, therefore, find controlling the general provisions of § 39-11-112 and the principles against retroactive application of statutes. The trial court correctly instructed the sentencing law in effect at the time the murder was committed.

[11] Defendant says he was prejudiced by failure to instruct mitigating circumstances raised by the evidence. He refers specifically to T.C.A. § 39-13-204(j)(2), that the murder was committed while defendant was under the influence of extreme mental or emotional disturbance, and T.C.A. § 39-13-204(j)(8), the capacity of the defendant to appreciate the wrongfulness of his conduct or conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect. The trial court ***83** declined to instruct the jury on these factors because he found no evidence in the record that *as a result* of mental disease the defendant could not conform his conduct to the requirements of the law. Defendant argued that the testimony of his witness, Dr. Eric Engum, a clinical psychologist and a licensed attorney, was sufficient to require an instruction on this mitigating circumstance. Dr. Engum testified that defendant was angry and impulsive and prone to outbursts of temper as the result of a personality disorder. The trial court was of the opinion that the disorder was prevalent even among law abiding persons, and in the absence of specific proof or a statement of causation about the relationship between the disorder and the offense, the instruction was not warranted. We do not find anything in the record to dispute this finding. The issue is without merit.

[12] Defendant insists the jury was inadequately instructed as to the meaning and function of mitigating circumstances. He says the trial judge did not define the term mitigating beyond the reference to any aspect of defendant's character or record, or "any aspect of any circumstances of the offense favorable to the defendant which is supported by the evidence." The trial judge followed the statute in delivering his instructions. Defendant was allowed to introduce such proof as he saw fit in mitigation. We are satisfied that the instruction was sufficient and appropriate. See *State v. Bell,* 745 S.W.2d 858, 864 (Tenn.1988).

[13] The trial judge instructed the jury that they should have no sympathy or prejudice or allow anything but the law and the evidence to have any influence upon them in determining their verdict. Defendant avers that this instruction prevented the jury from considering and giving effect to his evidence in mitigation. Defendant takes a negative approach to our rejection of a similar complaint in *State v. Boyd,* supra, in which the Court cited from *Saffle v. Parks,* 494 U.S. 484, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990), inter alia, "it is no doubt constitutionally permissible, but not constitutionally required, see *Gregg v. Georgia,* 428 U.S. 153, 189-195, 96 S.Ct. 2909, 2932-2935, 49 L.Ed.2d 859 (1976), ... for the State to insist that 'the individualized assessment of the appropriateness of the death penalty be [a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence],' " citing Justice O'Connor, concurring, in *California v. Brown,* 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987). The issue is without merit.

[14] Defendant says there is a reasonable likelihood that the jury understood the trial court's instructions as precluding them from considering any mitigating circumstances unless they unanimously agreed on its existence. We do not agree. As we noted in *State v. Bates,* 804 S.W.2d 868 (Tenn.1991), cert. denied 502 U.S. 841, 112 S.Ct. 131, 116 L.Ed.2d 98 (10/7/91), there is nothing in the Tennessee statutes, in the instructions given to the jury, or in the verdict form submitted to the jury, likely to lead any juror to believe that he or she was precluded from considering mitigating circumstances unless all jurors agreed that such circumstance existed. In this instance, too, no objection was raised at trial and the issue was not raised in the motion for new trial.

[15] Defendant states a number of issues, or sub-issues, involving the aggravating circumstance found in this case, (i)(7) (the murder occurred during a robbery) beginning with the charge that the trial court committed reversible error by failing to instruct the elements of robbery at the penalty phase. It is true that he did not. This was error. However, the Court previously defined robbery in its guilt phase instructions on felony murder. The error was harmless. *State v. Wright,* 756 S.W.2d 669, 675 (Tenn.1988).

[16] Defendant questions whether the evidence is sufficient to support the aggravating circumstance of murder in the perpetration of robbery. Citing *State v. Terry,* 813 S.W.2d 420, 423 (Tenn.1991), he says there is no proof of motivational relationship between the homicide and the felony. It is argued that the victim's truck and other property were taken only as an afterthought to the murder, which occurred because of defendant's inappropriate intense anger and lack of control. The evidence clearly bears out ***84** that a reasonable jury could conclude defendant left Alabama with the intent to steal a motor vehicle and, when he was unable to accomplish the theft of David Parten's Porsche, he then victimized Rodney Compton, whom he strangled during the course of the robbery.

Defendant returns to plow the ground of aggravating and mitigating circumstances, arguing that the evidence does not support the jury's finding. There is no doubt that the evidence clearly supported the jury's verdict. The jurors were justified in rejecting his theory of the homicide: that he killed the victim in angry rage. The jury was not required to accept his version of the events.

[17][18] Defendant argues that the sentence of death is excessive and disproportionate to the penalty imposed in similar cases. T.C.A. § 39-13-206(c)(1)(D) requires this Court to review the sentence of death to make that determination, considering both the nature of the crime and the defendant. Defendant seems to imply that this Court is limited to using in comparison only those cases in which the same aggravating factors are found. Of course, to do so would limit the proportionality review which is required of the Court. As defendant reminds us, what is important is an individualized determination based on the character of the individual and the circumstances of the crime. Insofar as the defense in this case is concerned, defendant's confession includes the admission that when he was invited into the victim's pickup truck, he got into the truck with the intention to rob him. He also stated that the victim made homosexual advances toward him and masturbated him. When that act was concluded he placed a pair of handcuffs on the victim and put him back in his truck. He

drove the two of them to another location where, he says, he intended to leave him unhurt. The victim began a loud outcry during which he admitted engaging in sexual abuse of children at the school where he worked as a teacher. This angered defendant, who then handcuffed the victim to a tree and began choking him. When he would not be quiet, defendant found some wire on the ground and wrapped it around his neck several times. He put a slip knot around the victim's neck and kept pulling on it. When the victim finally went limp, defendant says he thought the man passed out and tried to loosen the knot but could not get it loose. He observed the victim was not breathing and thought he was dead. He was scared they might be seen. He put the man back into the pickup truck and drove off to the place several miles down the road where Mr. Compton's body was subsequently found. He cut the wire off his neck with a hunting knife he carried, unlocked the handcuffs, covered the body with some hay and then returned to Birmingham, Alabama in Compton's pickup. He also had some of the victim's clothes and his wallet. He was subsequently apprehended in Refugio County, Texas, for speeding while driving the stolen truck. This admission, in conjunction with the other evidence and testimony in the record, was sufficient for the jury to find that defendant was guilty of first degree premeditated murder committed while he was engaged in committing a robbery, as opposed to the defense version of the circumstances of the offense.

Defendant says the homicide was not in furtherance of the robbery but was a separate, distinct and independent event produced by his mental disorder. Dr. Eric Engum testified to the background and psychological impairments of the defendant based on his early childhood background and records from earlier mental examinations. Dr. Engum diagnosed the defendant to be suffering from borderline personality disorder, a condition characterized by impulsive and unpredictible behavior, emotional withdrawal, marked shifts in behavior and attitude, intense anger, suicidal gestures, and the inability to maintain any kind of enduring relationship with others. He opined that the defendant adjusted well to institutionalization, where there was external control. He was not aggressive or violent in such an environment and only had difficulties when released.

The State presented Dr. Samuel Craddock, a clinical psychologist at the Middle Tennessee Mental Health Institute, who had observed the defendant for over two months. Dr. Craddock described the defendant as cooperative for most part during evaluation *85 although he may have been exaggerating some symptoms of mental illness. His IQ was 100. The jury heard all of this evidence and had the opportunity to observe the defendant's manner and demeanor during his testimony in open court. We cannot say from our review of this record that their judgment was inappropriate.

Defendant cites a number of cases in which the death sentence was based on the same aggravating circumstance involved in this case. He argues there is no indication in any of these that the defendant presented evidence of significant psychological impairment stemming from abuse and neglect when they were children. This has become a not uncommon defense in cases of this nature. (FN3) It is a defense to which the trial court and jury must give due consideration and one which this Court must scrutinize carefully in carrying out a proportionality review. These precautions were observed in this case. We find that the sentence of death was not imposed arbitrarily. The evidence supports the jury's finding that the murder was committed while defendant was engaged in committing a robbery and the absence of any mitigating circumstance sufficiently substantial to outweigh the aggravating circumstance found. Having considered the facts and circumstances of the offense, as well the background and nature of defendant, we hold that the sentence of death is not excessive or disproportionate to the penalty imposed in similar cases.

Defendant says the prosecution's misleading arguments in the penalty phase of the case undermined the reliability of the jury's sentencing determination.

The defendant raises these issues for the first time in this Court. No contemporaneous objections were made at trial nor were the issues raised on the motion for new trial. Nonetheless, we have examined the errors charged and find them to be without merit.

[19] Defendant says the prosecution argument shifted the burden of proof. The prosecutor stated during argument that in order to impose a life sentence, if the jury found an aggravating circumstance had been proved beyond a reasonable doubt, the jury would have to find that mitigating circumstances outweighed aggravating circumstances. This was an accurate statement of the law in effect at the time of the trial of this case. This argument did not shift the burden of proof. *See State v. Boyd, supra; State v. Cauthern,* 778 S.W.2d 39, 47 (Tenn.1989).

[20] It is complained the State's argument "that there were no mitigating circumstances in the case and that Dr. Engum's testimony concerning the defendant should be entitled little weight" limited the jury's consideration of mitigating factors. This argument did no more than set out the State's interpretation of the proof.

[21] Defendant says here that the prosecution's argument purposely confused the issue of culpability with criminal responsibility. The State argued to the jury, "There comes a time when you become responsible for your actions. I'm going to talk about responsibility. There comes a time where you just can't deny the responsibility as an adult. David Brimmer is a human being who must accept responsibility for his actions." It is defendant's position that he became criminally responsible for his actions when the jury convicted him. In the penalty phase the jury was required to make a moral inquiry into personal culpability, and to give individualized consideration to the defendant's background and character in making the determination that death was the appropriate penalty. He says the prosecution arguments could easily have misled the jury to believe that unless the death penalty was imposed defendant was not being held responsible for his behavior.

Our legal dictionary defines "culpable," in the criminal sense, to be "involving the breach of a legal duty or the commission of a fault," while "responsible" is defined in that sense as being "legally accountable or answerable." *Black's Law Dictionary* 379, 312 (6th Ed.1990). It is doubtful that the jury made the difference in their interpretation of ***86** the meaning to be given the State Attorney's words. However, looking at the argument as a whole, it appears to be the State's interpretation of the proof. Taken in context it appears that this argument went to the weight to be accorded the psychological factors urged in mitigation, i.e., the defendant had a bad childhood, which should excuse his actions in the premises. We look upon this argument to be a foray attacking defendant's personal blameworthiness or culpability.

[22] The defendant next argues that the State Attorney exceeded the bounds of closing argument by stating the case should not be decided on the basis of sympathy for the defendant. We have discussed this issue heretofore. This comment in the State's argument was closely followed by the admonition to the jury to decide the case on the basis of the law and facts. This was appropriate argument.

[23] Additionally, defendant complains that the prosecutor improperly diverted the jury's attention away from the defendant by invoking the memory of the victim. Defendant concedes that *Booth v. Maryland,* 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), upon which he relies, has been overruled. He suggests that we should find the argument in violation of Article I, Secs. 8 and 16 of the Tennessee Constitution. We decline that invitation. We consider the law on this issue to be well stated in *Payne v. Tennessee,* 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991).

[24] Defendant says the selection of the defendant as a candidate for the death penalty was arbitrary and capricious and resulted from an abuse of prosecutorial discretion. This issue is raised and presented for the first time in this Court. There is nothing in the record to support the facts on which the defendant relies. This argument is basically an attack on the "unlimited discretion vested in the prosecutor" as a violation of the principles stated in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). This argument has been rejected by the United States Supreme Court. In *Gregg v. Georgia,* 428 U.S. 153, 198-99, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976), the Court specifically noted that opportunities for discretionary action which inhere in processing of a murder case ..., including authority of the state prosecutor to select those persons whom he wishes to prosecute for a capital offense, ... do not render the death penalty unconstitutional on the theory that the opportunities for discretionary action render imposition of the death penalty arbitrary or freakish. We apply that rule in this case.

Defendant makes a broad based attack on the constitutionality of the Tennessee Death Penalty Statute. The principal arguments made on this issue are identical to or similar to issues previously addressed by the Court. The majority of these complaints are not personal to the defendant and have no effect on the outcome of this case. He makes reference to the aggravating circumstances set forth in T.C.A. § 39-13-204(i). He first complains of subsection (i)(6) (murder committed to avoid a lawful arrest or prosecution). Although the State sought the death penalty on (i)(6) in this case, the jury only found (i)(7) (the murder was committed while defendant was engaged in committing a robbery). He says the (i)(7) aggravating circumstance has been construed and applied in such a manner as to be synonymous with the felony murder rule. However, the jury in this case found defendant guilty of premeditated murder. The analogy is inappropriate. He alleges that circumstance (i)(5) is unconstitutionally vague or overbroad. The jury did not find this aggravating circumstance against him. He makes a sweeping charge that in combination, subsections (i)(2), (5), (6) and (7) encompass a majority of the homicides committed in Tennessee and results in the same wanton and freakish imposition of the death penalty upon a randomly selected handful of offenders as was found objectionable in *Furman v. Georgia,* supra. The above combination did not effect the judgment in defendant's case and does not warrant further discussion beyond the fact that this argument has been repeatedly rejected by this Court.

Defendant avers that the Tennessee Death Penalty Statute is imposed capriciously and arbitrarily because defendants may not address issues of parole eligibility, costs of ***87** imposing the death penalty, deterrent effect of the death penalty and cruelty of the method of execution. He finds fault with the instructions submitted to the jury in capital cases to the effect that jurors may rely upon their own common knowledge and experiences in reaching their verdict. He argues that these various restrictions violate the preference for a broad range of sentencing information as expressed in *Gregg v. Georgia,* supra, and cites various decisions from other states and law journal articles to sustain this theory of defense, ignoring the decisional law in this State on these issues. (FN4)

He urges that this Court reconsider past decisions on the issue of whether or not the jury should be told the effect of its failure to agree on a verdict. We are satisfied that our past decisions on this issue meet both State and Federal muster. *See State v. Barber,* 753 S.W.2d 659, 670-671 (Tenn.1988).

[25][26] He argues the jury is instructed that it must agree unanimously in order to impose a life sentence and is prohibited from being told the effect of a non-unanimous verdict. He suggests this rule violates the principle of *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), and *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). These cases stand for the principle that any requirement that the jury must find a mitigating circumstance unanimously before it can be considered violates the Eighth Amendment. A requirement of a unanimous verdict does not violate these principles. As this Court said in *State v. King,* 718 S.W.2d 241, 249 (Tenn.1986), "[t]here is no way a jury can impose a sentence if it is not unanimous in its decision." T.C.A. § 39-13-204(h) specifically provides that if the jury cannot ultimately agree as to punishment the trial judge shall dismiss the jury and impose a sentence of life imprisonment. *See State v.*

Thompson, 768 S.W.2d 239, 252 (Tenn.1989).

Defendant argues a number of issues which have long been settled by this Court. He says there is reasonable likelihood that jurors believe they are required to unanimously agree as to the existence of mitigating circumstances because of the failure to instruct on the meaning and function of mitigating circumstances. We have previously responded to this issue in this opinion. He argues the jury is not required to make the ultimate determination that death is the appropriate penalty. This issue has been considered and rejected in numerous cases. *See State v. Black*, supra.

The Constitution does not require and the Court does not approve the uniform standards or procedures for qualifying juries in capital cases which defendant requests. Defendant raises a variety of generalized issues which do not merit response because they have previously been considered in this opinion or have been decided adversely to defendant's position heretofore. (FN5) Defendant deprecates appellate review of capital sentences in Tennessee for several reasons. He says there is no requirement for written findings concerning mitigating circumstances. This argument was rejected in *State v. Melson*, 638 S.W.2d 342, 368 (Tenn.1982). He says information relied upon for comparative review is inadequate and incomplete. His particular complaint is that Rule 12 reports filed by the trial judge do not contain sufficient information for determination of whether a death sentence is excessive or disproportionate. The simple answer to this complaint is that use of the trial judge's Rule 12 report by this Court is only one facet of the Court's appellate review. T.C.A. § 39-13-206 is explicit in its directions to the Court in making its proportionality review to determine whether the sentence of death is excessive or disproportionate to the penalty imposed in ***88** similar cases considering the nature of the crime and the defendant. The Court has made its individualized determination on the basis of the evidence contained in the record of the case and in accordance with the statute.

[27] Finally, defendant has raised an issue of first impression alleging in part that the death penalty per se and as applied violates Article I, Sec. 32 of the Tennessee Constitution. Defendant hypothesizes that Article I, Sec. 32 was meant to proscribe "government-sponsored vengeance against those the government considered outside its law." He then argues that in light of a contemporary standard of humanity and the main purpose of the death penalty (retribution), the death penalty is therefore inhumane and a form of "government-sponsored vengeance." Article I, Sec. 32 provides in its entirety: "That the erection of safe and comfortable prisons, the inspection of prisons, and the humane treatment of prisoners, shall be provided for."

We preface our consideration of this issue with the verity that the federal government has, by and large, preempted both the operation and construction of the prison system in the State of Tennessee to the extent that its supervision has been under federal control and the State has had very little to say about the treatment of prisoners in any respect. We do not believe the treatment of prisoners in this State falls outside the parameters described by defendant, which must be drawn in accordance with "evolving standards of decency that mark the progress of a maturing society."

Insofar as the issue of whether or not the death penalty constitutes cruel and unusual punishment is concerned, this Court has repeatedly held that this State is not prohibited from imposing the death penalty in the manner set forth in conformity with the penal statutes, by the restraints imposed by the United States Constitution, or by any of the provisions of the Tennessee Constitution previously considered. We hold that Article I, Sec. 32 does not add any additional restriction.

In accordance with the mandate of T.C.A. § 39-13-206 we find that the sentence of death was not imposed in an arbitrary fashion; that the evidence supports the jury's finding of the aggravating circumstance that the homicide was committed while defendant was engaged in committing a robbery; that the evidence supports the jury's finding of the absence of any mitigating circumstances sufficiently substantial to outweigh the aggravating circumstance found. Our comparative proportionality review convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases, considering the nature of the crime and the defendant. (FN6) The sentence of death will be carried out as provided by law on the --- day of _____, 1994, unless otherwise ordered by this Court or other proper authority. Costs on this appeal are adjudged against the defendant.

DROWOTA and ANDERSON, JJ., concur.

REID, C.J., files separate concurring and dissenting opinion.

DAUGHTREY, J., files opinion concurring in part and dissenting in part.

REID, Chief Justice, concurring and dissenting.

I concur with the conclusion reached by the majority that the record supports the conviction of premeditated first degree murder.

I join Justice Daughtrey's dissent that the failure of the trial court to charge mitigating circumstance (j)(8) requires a re-sentencing hearing. T.C.A. § 39-2-203(j)(8) (1982) provides:

> The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a ***89** defense to the crime but which substantially affected his judgment.

A clinical psychologist, who had examined the defendant and studied his records from earlier mental examinations, diagnosed the defendant as suffering from borderline personality disorder, a condition characterized by impulsive and unpredictable behavior, emotional withdrawal, marked shifts in behavior and attitude, intense anger, suicidal gestures, and the inability to maintain any kind of enduring relationship with others. After

having been abandoned as a small child, the defendant was placed with various foster families, until, at the age of 13, he was placed in an institution for children with behavioral problems, where he remained for four years. The records of that institution describe the defendant as suffering "burned child syndrome," a condition characterized by feelings of fear and internal anger generated by parental abandonment. Later, while hospitalized in the psychiatric unit of a Texas hospital, the defendant was diagnosed as having "factitious disorder," a condition where the sufferer seeks to play the role of patient because of the absence of any emotional connections with others. While incarcerated awaiting trial, he was sent to the Lakeshore Mental Health Center in Knoxville because of suicidal behavior. This evidence was proof that the defendant suffered a mental disease.

However, the majority opinion approves the trial court's refusal to charge mitigating circumstance (j)(8) because there was no proof that, *as a result* of the mental disease, the defendant could not conform his conduct to the requirements of the law. Of course, proof that the killing was the *result* of a mental disease would be proof of insanity and the defendant would be entitled to a verdict of not guilty by reason of insanity.

> Insanity is a defense to prosecution if, at the time of such conduct, as a result of mental disease or defect, the person lacked substantial capacity either to appreciate the wrongfulness of the person's conduct or to conform that conduct to the requirements of law.

T.C.A. § 39-11-501(a) (1991); *Graham v. State*, 547 S.W.2d 531, 543 (Tenn.1977).

> In all criminal cases in which the trial judge charges the jury on the law relating to the defense of insanity, the judge shall also charge the jury that if it should find the defendant to be not guilty by reason of insanity that it shall so state in its verdict.

T.C.A. § 40-18-117 (1990). By requiring proof that the defendant could not conform his conduct to the requirements of law, *supra* at 13-14, the majority seems to eliminate any mental condition less severe than insanity as a mitigating circumstance.

I would remand for re-sentencing, because the failure to charge mitigating circumstance (j)(8) was reversible error.

DAUGHTREY, Justice, concurring in part and dissenting in part.

The defendant was convicted of the premeditated murder of Rodney Compton and was sentenced to death based on a single aggravating circumstance, the fact that he killed the victim while committing robbery. Most of the alleged trial errors that serve as the basis for this appeal are, as the majority concludes, meritless challenges to the guilt and sentencing phases of his trial. One, however, deserves the Court's careful attention. During the sentencing hearing the trial court refused to instruct the jury that it was permitted to consider as mitigating evidence any mental disease or defect that substantially impaired Brimmer's ability to appreciate the wrongfulness of his conduct or to conform his conduct to the law. *See* T.C.A. § 39-2-203(j)(8) (1982), *amended by* T.C.A. § 39-13-204 (1992). This failure to instruct the jury on this mitigating evidence denied the defendant his right to have the jury charged on every defense to the death penalty raised by the evidence and, therefore, denied the defendant substantial justice. Because of this error, I would remand this case to the trial court for resentencing.

It is fair to conclude, as the majority does, that the proof at trial was sufficient to convict Brimmer of premeditated murder. The majority opinion, however, fails to summarize that evidence. The record shows that the defendant, an unemployed drifter, was stopped in February of 1990 for speeding in ***90** Texas after leading the Texas authorities on a twenty-mile high-speed chase. The police determined that the defendant was driving Rodney Compton's truck and, after contacting the Tennessee authorities, discovered that Compton had been murdered in October of 1989. The Texas police tried to interview Brimmer several times, but Brimmer gave false names and provided no information. After about 20 days in solitary confinement, however, the defendant confessed to the Compton murder. Moreover, as the police transported him to Tennessee, he identified the site of the murder.

The defendant admitted the killing, but denied planning the murder. Instead, he said that Compton offered him a ride and insisted that he accepted with the intent only to rob Compton. Brimmer stated that Compton made sexual advances toward him, and that the defendant then handcuffed Compton, intending to leave him unharmed in a park. According to the defendant, however, when Compton began to tell the defendant about his sexual abuse of children, the defendant grew angry and choked Compton to death. Then, frightened that someone might have seen him at the site of the murder, he drove Compton's body to the field where it was later discovered.

Other evidence, however, supported the state's theory that the defendant had planned both the robbery and the murder. Ann Marie Hill testified that the defendant had lived with her in Alabama before the murder, but that he was known to her by a different name. Ms. Hill testified that Brimmer told her before the murder that he intended to pick up his Porsche in Tennessee. She testified that she drove Brimmer part of the way to Tennessee on the afternoon of October 21, 1989, and that he carried a gun and a large knife on the trip. David Parten, the defendant's former cellmate, testified that he previously had told the defendant about a Porsche that Parten owned, and that the defendant had arranged to meet Parten in Oak Ridge around October 22. Parten testified that he met Brimmer once in Oak Ridge, but decided not to meet him again because he felt uneasy about the situation. From the testimony of these two witnesses, the jury could have inferred that Brimmer drove to Tennessee with the intent to steal Parten's car and that he resorted to the robbery and murder of Compton only after Parten failed to show up.

In addition to this testimony, the victim's mother and brother stated that on October 22, Compton had been returning home from a vacation to celebrate his mother's birthday and thus, impliedly, would not have been searching for a sexual encounter. Additional evidence indicating that Brimmer gave false names to everyone he met and repeatedly lied about his background weakened his credibility and diminished the likelihood that his story was true. The evidence was sufficient for the jury to have found him guilty of premeditated murder.

Despite the sufficiency of the evidence, the Court should not overlook the trial court's failure to instruct the jury, in accordance with T.C.A. § 39-2-203(j)(8) (1982), (FN1) that it must consider any evidence that

> [t]he capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

During the sentencing hearing, Brimmer presented the testimony of Dr. Eric Engum, a clinical psychologist, who concluded that the defendant was suffering from a borderline personality disorder marked by sudden changes in behavior, intense anger, suicidal attempts, and the inability to maintain relationships. Dr. Engum testified that between 500,000 and two million people in the United ***91.** States probably suffer from this disorder, and that many of these people violate the law. The trial court, however, concluded that the defendant's disorder was common, that it was "not quite" a mental disease or disorder, and that Dr. Engum did not state the "magical words" that the disease "caused" the defendant to commit the crime. The trial judge therefore refused to instruct the jury on this mitigating evidence.

Although the defendant requested this instruction at trial, he failed to present the issue of the denial of the instruction in his motion for a new trial. On appeals as of right, Tenn R.App.P. 3(e) provides that:

> [I]n all cases tried by a jury, no issue presented for review shall be predicated upon error in ... jury instructions granted or refused, ... unless the same was specifically stated in a motion for a new trial.

Nevertheless,

> [a]n error which has affected the substantial rights of an accused may be noticed at any time, even though not raised in the motion for a new trial ... where necessary to do substantial justice.

Tenn.R.Crim.P. 52(b). Such error, called "plain error," can therefore be noticed by an appellate court despite the failure to include the issue in the motion for a new trial.

The trial court plainly erred by refusing to instruct the jury on a matter that is indisputably fundamental in a capital case--the jury's consideration of the mitigating evidence. The capital sentencing statute in effect at the time of Brimmer's offense provided that "the trial judge shall include in his instructions for the jury to weigh and consider any mitigating circumstance ... which may be raised by the evidence...." T.C.A. § 39-2-203(e) (1982) (amended 1989). Dr. Engum testified extensively on the defendant's psychological background and concluded that he suffered from a borderline personality disorder that did affect his judgment. Certainly the jury was entitled and, pursuant to the statute, *required* to consider whether this disorder substantially impaired "the capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law." Under the circumstances of this case, the failure to instruct the jury on this mitigating evidence clearly violated the sentencing statute. By failing to instruct the jury on "fundamental" evidence required by statute, the court denied the defendant substantial justice, as it is defined in Tennessee case law.

In my judgment, the only appropriate remedy for this error is a remand of this case to the trial court for resentencing.

ORDER ON PETITION TO REHEAR

Filed May 2, 1994.

Defendant has filed a respectful petition to rehear which the Court has considered and finds that the petition does not contain new material or argument which warrants reconsideration.

The petition to rehear is denied.

REID, C.J., and DROWOTA and ANDERSON, JJ., concur.

DAUGHTREY, J., not participating.

(FN1.) *See Spano v. New York,* 360 U.S. 315, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959).

(FN2.) The statute was originally enacted as T.C.A. § 39-13-203 by the 1989 Act, and was redesignated as T.C.A. § 39-13-204 by Ch. 1038, § 3 Pub. Acts 1990.

(FN3.) *See State v. Irick,* 762 S.W.2d 121 (Tenn.1988); *State v. Jones,* 789 S.W.2d 545 (Tenn.1990); *State v. Bates,* 804 S.W.2d 868 (Tenn.1991); *State v. Smith,* 868 S.W.2d 561 (Tenn.1993).

(FN4.) *See State v. Johnson,* 632 S.W.2d 542, 547-548 (Tenn.1982); *State v. Aakins,* 725 S.W.2d 660, 664 (Tenn.1989); *State v. Black,* 815 S.W.2d 166, 179 (Tenn.1991).

(FN5.) Denial to defendant of final closing argument at the penalty phase; *see State v. Thompson,* 768 S.W.2d 239, 252 (Tenn.1989). The death penalty is inflicted based on economic, racial, geographical, and gender discrimination. Defendant has presented no evidence on this issue. *See generally, McClesky v. Kemp,* 481 U.S. 279, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987); *State v. Porterfield,* 746 S.W.2d 441, 451 (Tenn.1988). Electrocution is cruel and unusual punishment. This argument was rejected by a majority of this

Court in *State v. Black,* 815 S.W.2d 166, 178-179 (Tenn.1991).

*91_ (FN6.) *State v. Poe,* 755 S.W.2d 41 (Tenn.1988) similar brutal murder; *State v. Carter,* 714 S.W.2d 241 (Tenn.1986) murder to steal car; *State v. Zagorski,* 701 S.W.2d 808 (Tenn.1985) murder to steal money; *State v. Caldwell,* 671 S.W.2d 459 (Tenn.1984) similar claim by defendant that victim made sexual advances; *State v. Morris,* 641 S.W.2d 883 (Tenn.1982).

(FN1.) The defendant was sentenced in March of 1991. At that time, the capital sentencing statute had been amended since the date of his offense, and is now codified as T.C.A. § 39-13-204 (1991). However, in implementing the new statute, the General Assembly specifically provided in T.C.A. § 39-11-112 (1991) that "any offense, as defined by the statute ... being ... amended, committed while such statute or act was in full force and effect shall be prosecuted under the act or statute in effect at the time of the commission of the offense." This statute apparently requires the application of the capital sentencing statute in effect at the time of Brimmer's offense.

*679 958 S.W.2d 679

Supreme Court of Tennessee,
at Knoxville.

STATE of Tennessee, Appellee,
v.
Leroy HALL, Jr., Appellant.
Dec. 15, 1997.

Defendant was convicted in the Criminal Court, Hamilton County, Stephen M. Bevil, J., of first-degree murder and aggravated arson and was sentenced to death by execution. Defendant appealed. The Court of Appeals, Tipton, J., affirmed. Defendant appealed. The Supreme Court, Drowota, J., held that: (1) trial court properly excluded expert psychiatric testimony from guilt phase of trial; (2) evidence supported jury's findings as to aggravating circumstances; (3) trial court's refusal to give instructions on nonstatutory mitigating circumstances was harmless error; and (4) sentence was not disproportionate to penalty imposed in similar cases.

Affirmed.

Reid, J., concurred and filed opinion.

West Headnotes

[1] Criminal Law ⇐46
110 ----
110VI Capacity to Commit and Responsibility for Crime
110k46 Capacity in General.
"Diminished capacity" is not considered a justification or excuse for a crime, but rather an attempt to prove that defendant, incapable of requisite intent of crime charged, is innocent of that crime but most likely guilty of lesser included offense; thus, defendant claiming diminished capacity contemplates full responsibility, but only for the crime actually committed.

[2] Criminal Law ⇐46
110 ----
110VI Capacity to Commit and Responsibility for Crime
110k46 Capacity in General.
"Diminished capacity" is actually defendant's presentation of expert, psychiatric evidence aimed at negating requisite culpable mental state; properly understood, it is not a defense at all but merely a rule of evidence.

[3] Criminal Law ⇐354
110 ----
110XVII Evidence
110XVII(D) Facts in Issue and Relevance
110k354 Insanity.
Evidence which tends to prove or disprove required mental state for offense is relevant and generally admissible in criminal prosecution. Rules of Evid., Rule 401.

[4] Criminal Law ⇐474
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474 Mental Condition or Capacity.
To be admissible in criminal prosecution, expert testimony regarding defendant's incapacity to form required mental state must substantially assist trier of fact to understand evidence or to determine fact in issue. Rules of Evid., Rule 702.

[5] Criminal Law ⇐469.2
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k469.2 Discretion.
Admissibility of expert opinion testimony in criminal prosecution is matter which largely rests within sound discretion of trial court. Rules of Evid., Rule 702.

[6] Criminal Law ⇐474
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474 Mental Condition or Capacity.
To gain admissibility in criminal prosecution, expert testimony regarding defendant's incapacity to form required mental state for offense must satisfy general relevancy standards as well as evidentiary rules which specifically govern expert testimony. Rules of Evid., Rules 401-403, 702, 703.

[7] Criminal Law ⇐474
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474 Mental Condition or Capacity.
Assuming that general relevancy standards as well as evidentiary rules which specifically govern expert testimony are satisfied, psychiatric evidence that defendant lacks capacity, because of mental disease or defect, to form requisite culpable mental state to commit offense charged is admissible in criminal prosecution. Rules of Evid., Rules 401-403, 702, 703.

[8] Criminal Law ⇐474
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474 Mental Condition or Capacity.
To be admissible in criminal prosecution, psychiatric testimony must demonstrate that defendant's inability to form requisite culpable mental state was product of mental disease or defect, not just particular emotional state or mental condition; it is the showing of lack of capacity to form requisite culpable mental intent that is central to evaluating admissibility of expert psychiatric testimony on issue.

[9] Criminal Law ⇐474
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474 Mental Condition or Capacity.
Expert psychiatric testimony was not relevant to show that defendant lacked capacity to form requisite intent because of mental disease or defect or intoxication, and, therefore, was properly excluded from guilt phase of capital murder trial; testimony related to defendant's personality type and

character traits and, while psychiatrist testified that defendant had borderline personality disorder and that such people could have brief episodes of rage during temporary states of mental illness, he did not state that defendant was experiencing such an episode when he killed his former girlfriend.

[10] Criminal Law ⚿1036.1(9)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.1 In General
110k1036.1(9) Exclusion of Evidence.
If offer of proof is not made, evidentiary issue is generally deemed waived and appellate review is precluded.

[11] Criminal Law ⚿1036.6
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1036 Evidence
110k1036.6 Opinion Evidence.
Although defendant did not make offer of proof, Supreme Court could review issue of whether expert psychiatric testimony was properly excluded from guilt phase of capital trial, based upon substance of psychiatrist's testimony at sentencing hearing.

[12] Criminal Law ⚿474
110 ----
110XVII Evidence
110XVII(R) Opinion Evidence
110k468 Subjects of Expert Testimony
110k474 Mental Condition or Capacity.
While evidence that particular defendant, because of mental disease or defect, lacks capacity to form requisite intent is admissible in criminal prosecution, expert opinion testimony about typical reactions of certain personality types is not relevant to capacity of the particular defendant on trial.

[13] Sentencing and Punishment ⚿1660
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1660 Dual Use of Evidence or Aggravating Factor.

(Formerly 203k357(10))
Jury's finding, in capital murder prosecution, of aggravating circumstance for especially heinous or cruel murder and aggravating circumstance that murder was committed while defendant was committing arson were not based upon same evidence, so as to constitute unconstitutional double counting, even though victim was killed when she was set on fire inside her automobile; jury's finding of the first aggravating circumstance was based upon torturous means by which defendant chose to kill victim, and suffering she endured prior to her death, and jury's finding of second aggravating circumstance was based upon defendant's commission of murder during perpetration of separate felony, the destruction *679 of the automobile by arson. West's Tenn.Code, § 39-13-204(i)(5, 7).

[14] Criminal Law ⚿878(4)
110 ----
110XX Trial
110XX(K) Verdict
110k878 Several Counts
110k878(4) Inconsistent Findings.
Jury's finding, in capital murder prosecution, of felony murder aggravating circumstance was not inconsistent with its verdict of premeditated murder; evidence demonstrated that defendant had relentlessly searched for victim's automobile intending to burn it, and when victim refused to leave automobile, defendant refused to be deterred from his original purpose and then proceeded, with premeditation and deliberation, to murder victim by pouring gasoline directly onto her body and igniting the accelerant. West's Tenn.Code, § 39-13-204(i)(7).

[15] Sentencing and Punishment ⚿1681
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 Killing While Committing Other Offense or in Course of Criminal Conduct.

(Formerly 203k357(7))
Sufficient nexus existed between arson and murder to warrant felony murder aggravating circumstance; victim was killed when defendant set fire to victim's automobile while victim was inside it, and defendant's motivation for killing victim and in burning her automobile were the same, anger over the victim's decision to discontinue their relationship. West's Tenn.Code, § 39-13-204(i)(7).

[16] Criminal Law ⚿829(22)
110 ----
110XX Trial
110XX(H) Instructions: Requests
110k829 Instructions Already Given
110k829(22) Punishment and Powers of Recommendation to Mercy.
Trial court's refusal, in capital murder case, to give requested instructions on nonstatutory mitigating circumstances was harmless error, since court's instructions generally encompassed subjects contained within defendant's special requests and fairly conveyed to jury its ability consider wide range of proof as mitigating circumstances, trial court permitted defendant to introduce substantial proof of nonstatutory mitigating circumstances, and trial court allowed defense counsel broad latitude to argue nonstatutory mitigating circumstances to jury during closing argument at sentencing phase.

[17] Criminal Law ⚿769
110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k769 Duty of Judge in General.

[See headnote text below]

[17] Criminal Law ⚿1172.1
110 ----
110XXIV Review

110XXIV(Q) Harmless and Reversible Error
110k1172 Instructions
110k1172.1 In General.
Jury charge should be considered prejudicially erroneous if it fails to fairly submit legal issues or if it misleads jury as to applicable law.

[18] Sentencing and Punishment ⚿ 1788(7)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(7) Presumptions.

(Formerly 110k1134(3))
In conducting comparative proportionality review of death sentence, court begins with presumption that sentence of death is proportional to crime of first degree murder; however, if capital case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which death penalty has been imposed, sentence of death in case being reviewed is disproportionate.

[19] Sentencing and Punishment ⚿ 1657
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1657 Proportionality in General.

(Formerly 110k1208.1(4.1))
Even if defendant receives death sentence when circumstances of offense are similar to those of offense for which another defendant has received a life sentence, death sentence is not disproportionate if court can discern some basis for lesser sentence given in similar case.

[20] Sentencing and Punishment ⚿ 1657
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1657 Proportionality in General.

(Formerly 110k1208.1(4.1))
Where there is no discernable basis for difference in sentencing, death sentence is not necessarily disproportionate; court is not required to determine that sentence less than death has never been imposed in case with similar characteristics, but rather, its duty under similarity standard is to assure that no aberrant death sentence is affirmed.

[21] Sentencing and Punishment ⚿ 1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.

(Formerly 110k1134(3))
Since proportionality requirement on review of death sentence is intended to prevent caprice in decision to inflict death penalty, isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under system that does not create substantial risk of arbitrariness or caprice.

[22] Sentencing and Punishment ⚿ 1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.

(Formerly 110k1134(3), 110k1134(2))
Comparative proportionality review of death sentence is not a rigid, objective test; court does not employ mathematical formula or scientific grid, nor it is bound to consider only those cases in which exactly the same aggravating circumstances have been found by jury.

[23] Sentencing and Punishment ⚿ 1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.

(Formerly 110k1134(3))
Under comparative proportionality review of death sentence, after identifying pool of similar cases, court considers multitude of variables in light of experienced judgment and intuition of members of the court.

[24] Sentencing and Punishment ⚿ 1681
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 Killing While Committing Other Offense or in Course of Criminal Conduct.

(Formerly 203k357(7))

[See headnote text below]

[24] Sentencing and Punishment ⚿ 1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

(Formerly 203k357(11))
Imposition of death penalty for defendant's torturous and cruel premeditated killing of his former girlfriend by pouring gasoline over her and igniting the accelerant was not disproportionate to penalty imposed in similar cases.

***682** Brock Mehler (Appeal Only), Nashville, William R. Heck (Trial and Appeal), Karla G. Gothard (Trial Only), Chattanooga, for Appellant.

John Knox Walkup, Attorney General and Reporter, Michael E. Moore, Solicitor General, Amy L. Tarkington, Assistant Attorney General, Nashville, William H. Cox, III, District Attorney General, Thomas J. Evans, Assistant District Attorney General, Chattanooga, for Appellee.

OPINION

DROWOTA, Judge.

In this capital case, the defendant, LeRoy Hall, Jr., was convicted of premeditated first degree murder and aggravated arson. (FN1) In the sentencing hearing, the jury found two aggravating circumstances: (1) "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;" and (2) "[t]he murder was committed while the defendant was engaged in committing or was attempting to commit, arson." Tenn.Code Ann. § 39-13-204(i)(5) and (7) (1991). Finding that the two aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt, the jury sentenced the defendant to death by electrocution.

On direct appeal to the Court of Criminal Appeals, the defendant challenged both his conviction and sentence, raising thirteen claims of error, some with numerous subparts. After fully considering the defendant's claims, the Court of Criminal Appeals affirmed the trial court's judgment. Thereafter, pursuant to Tenn.Code Ann. § 39-13-206(a)(1) (1996 Supp.), (FN2) the case was docketed in this Court.

The defendant raised numerous issues in this Court, but after carefully examining the *683 entire record and the law, including the thorough opinion of the Court of Criminal Appeals and the briefs of the defendant and the State, this Court, on August, 27, 1997, entered an Order, limiting review at oral argument to four issues and setting the cause for the September, 1997, term of this Court in Knoxville. *See* Tenn. S.Ct. R. 12. (FN3)

After reviewing the record, we have determined that none of the alleged errors require reversal. Moreover, the evidence supports the jury's findings as to the aggravating and mitigating circumstances, and the sentence of death is not arbitrary or disproportionate to the sentence imposed in similar cases, considering the nature of the crime and the defendant. Accordingly, the judgment of the Court of Criminal Appeals upholding the defendant's conviction for first degree murder and sentence of death by electrocution is affirmed.

FACTUAL BACKGROUND

The evidence presented at the guilt phase of the trial demonstrated that around midnight on April 16, 1991, the defendant threw gasoline on the victim, Traci Crozier, his ex-girlfriend, as she was lying in the front seat of her car. The victim received third degree burns to more than ninety percent of her body and died several hours later in the hospital. When questioned by police, the defendant initially denied involvement in the offense. Eventually, however, Hall admitted responsibility, but claimed that he did not intend to kill the victim: he intended to burn her car.

The victim met the defendant in December of 1984. They began living together in January of 1986, and continuously resided together until, three weeks prior to her murder. On March 26, 1991, the victim left and moved into the house with her grandmother, Gloria Mathis, and her uncle, Chris Mathis. After the separation, the defendant would frequently, and often late at night, call the Mathis home in search of the victim. In the early morning hours of April 6, 1991, the Mathis household was awakened by a dog barking and looked outside to see the victim's car, a two-door Nissan Pulsar, burning. The victim's uncle saw the defendant running away from the burning car and fired a gunshot into the air. The fire department was called to extinguish the fire and investigate the arson. When the defendant called the Mathis house thereafter, the victim's uncle threatened Hall in the event he did not leave the victim alone. The defendant responded: "If I can't have her, nobody can't." [sic]

On the night of April 16, 1991, shortly before midnight, Viola Wylene Price was sitting in her car outside her home when she saw "a ball of fire" in the middle of the street. As she started to get out of her car, a black car, later identified as being similar to the defendant's, sped away from the scene. After the car passed, Price ran into her house and called 911. Her son, Billy Ray Wilson, was inside and when he heard his mother call for emergency assistance, he ran outside to see what was happening. When he saw the burning car and heard someone inside it screaming for help, Wilson ran to the driver's side of the car. Though the door was open, he could not see anyone through the flames. Wilson ran around to the passenger side of the car where he saw the victim attempting to get out through the window. Wilson pulled the victim from the car, removed her burning shoes and clothes, helped her extinguish the flames on her body, and assisted her to a safe distance from the burning car in the event of an explosion.

Price returned to the scene after calling for emergency assistance. Though the victim had been so badly burned that her hair was melted and skin was hanging from her arms, she remained coherent and alert. The victim expressed concern about her appearance and the likelihood of permanent scarring from the burns. She gave Price her name and telephone number. When Price asked the victim for the identity of the perpetrator, the victim responded, "Lee Hall." The victim also told Price that Hall twice previously had set fire to her car. The *684 victim told Wilson that the defendant "threw gas on me, gas bomb." She repeated, "it was gas, gas bomb. He set me on fire."

Earl Atchley, Commander of the Chattanooga Fire Department, received the 911 call at 12:06 a.m. on April 17, 1991. When he arrived at the scene the victim's car was "fully involved" in fire and the victim was badly burned. Though Commander Atchley did not recognize her, the victim remembered him as the person who had investigated the burning of her car on April 6, 1991. (FN4) The victim told Commander Atchley that the same person was responsible for both incidents. Commander Atchley recovered a melted plastic container next to the driver's side of the victim's car, and a tupperware lid, which was not as badly melted, near the car.

The victim was taken to Erlanger Hospital where she was treated by Dr. Sonya Merriman, a plastic surgeon and burn specialist. Describing the victim's condition, Dr. Merriman stated, "She had a 95 percent, what we call a total body surface area burn, 95 percent of her body was burned, and all but about

two to three percent of that was third degree burns." The victim's teeth were charred, and the hair was burned off her body. Based upon the consistency and uniformity of the burns over the victim's entire body, except the soles of her feet, Dr. Merriman opined that the victim's body had been doused with gasoline, rather than splattered or splashed. Although Dr. Merriman had treated nearly one hundred burn cases, she had never seen a worse or more uniform pattern of burning on an individual.

The victim was treated with intravenous fluids and incisions in her body designed to allow tissue expansion. Nonetheless, the victim's condition deteriorated. Her tongue swelled until it protruded from her mouth, and her eyelids became inverted from the swelling. Despite the gravity and extent of her injuries, however, Dr. Merriman testified that the victim remained conscious. She was also in constant pain. According to Dr. Merriman, the medication administered to the victim would not have been strong enough to alleviate her pain, and the victim did not sleep for long periods of time or lose consciousness until just before her death. The victim, according to Dr. Merriman, sustained an unsurvivable burn from which there was never any chance of recovery.

Ed Forester, an investigator with the Arson Division of the Chattanooga Police Department, examined the victim's car after both the April 6 and April 16 fires. His investigation of the April 6 fire revealed that an accelerant had been poured around the exterior edges of the car which melted the fenders and bumpers. A yellow plastic jug found at the scene tested positive for gasoline. Forester obtained an arrest warrant for the defendant based, in part, upon the statements of the victim's uncle.

Forester testified that the vehicle burned on April 6 was the same automobile involved in the fire on April 16, 1991. The most extensive damage resulting from the fire on April 16 was to the driver's side of the car. The metal was discolored; the roof sagged; and the seat springs were weakened. The glass on the passenger side was fire and carbon stained; however, glass found on the driver's side had no such markings. The lack of fire or carbon staining indicated that the glass on the driver's side had been broken out before the fire was started. A melted plastic container was found near the open driver's door of the victim's vehicle. The victim's socks, shoes, and clothing remains were recovered and later tested positive for the presence of gasoline. Car keys were found some thirty feet away from the victim's car.

Mike Donnelly, an arson investigator with the State of Tennessee Fire Marshall's Office, also examined the victim's car. He found evidence of three separate fires to the car. Based upon the extent of damage, Donnelly opined that the April 16 fire had been started on the driver's side of the vehicle. Based upon his examination of the car and his review of photographs of the victim, Donnelly testified that gasoline had been poured directly onto the victim.

*685 Testifying for the defense during the guilt phase of the trial were Morris Forester and Jeffery Scott Green. Forester and Green had been drinking with the defendant in the early evening of April 16, 1991. The trio consumed about two and one-half cases of beer and were intoxicated. Forester went to bed around 10:30 p.m. and did not see the defendant thereafter. Green recalled seeing the defendant between 10:30 and 11:00 p.m. Because he knew the defendant was intoxicated and unable to drive, Green tried to persuade the defendant to spend the night at Forester's home. Eventually, however, the defendant left, and neither Green nor Forester saw him again until after the murder.

The defendant also testified in his own behalf. According to his testimony, he and the victim began living together in January of 1986, when he was eighteen and she was sixteen years old. Even though the victim moved out in March of 1991, they continued to see one another after the separation. The defendant said he was upset by the separation, and as a result, had been drinking and smoking crack cocaine. On the day of the murder, Hall and Green went directly to Forester's house and began drinking beer. At one point, Hall left and obtained a hammer at a pawn shop. After attempting to call the victim several times, without success, Hall returned to Forester's home about 6:30 p.m. or 7:00 p.m. and continued drinking.

Hall consumed approximately one case of beer, then left Forester's home, taking with him five more cans of beer. After purchasing another six cans of beer, Hall drove to the mobile home he had shared with the victim and destroyed some of her possessions because he was angry with her for not coming home. Hall left the trailer after a short time and took with him a two-quart tea jug which he intended to use to burn the victim's car. Searching for the victim and her car, Hall drove by her work place, her grandmother's house, and several bars, but he did not find her. Hall was threatened by the victim's uncle and a second man whom he did not know when he drove by the victim's grandmother's house. Thereafter, Hall stopped at a service station, filled the tea jug with gasoline, and purchased a cigarette lighter. Hall removed paper towels from a dispenser near the gas pumps, placed them in the opening of the tea jug, put the container in his car, and returned to the area near the victim's grandmother's house.

As Hall was preparing to leave the neighborhood, he encountered the victim as she drove up in her car. According to Hall, he left his car and entered the victim's car on the driver's side to talk. Hall asked her to move back in with him and told her that he was drunk and needed her. He asked the victim if she was pregnant and told her that she could not have another abortion. Finally, Hall questioned why he had been blamed for the earlier burnings of her car. An argument ensued. The victim called the defendant a "crazy S.O.B.," and told him to turn himself into the authorities.

At that point, Hall got out of her car and told the victim to do likewise because he was going to burn it. When the victim tried to lock the door, Hall reached inside the car, grabbed the keys, threw them towards his car, and ordered the victim to get out of her car. Hall then ran to his car and grabbed the jug of gasoline. He ignited the paper towels and threw the jug into the driver's side of the victim's car. The defendant knew the victim was lying in the front seat crying when he threw the gas bomb into the

car.

According to the defendant, after he threw the gasoline jug, the victim came running toward him, out of the burning car, and caught him on fire. The defendant extinguished the flame on himself and then just looked at the victim, who according to the defendant, ran to the passenger's side of the car, and rolled on the ground. Unsure of what to do and believing that the fire on the victim was almost extinguished, the defendant drove away from the scene. Although he claimed to have returned two or three minutes later, he did not see the victim, and he fled again when a black shadowy figure ran toward him.

On cross-examination, the defendant denied pouring gasoline onto the victim, claiming that it splattered on her when he threw the jug into the car. He also denied breaking the glass on the driver's window, insisting that the door was open. He proclaimed *686 that he loved the victim and intended only to burn her car. The defendant admitted that he initially denied the offense when questioned by police. He also claimed to the police that he never meant to hurt the victim and had the gas bomb for protection from the victim's uncle, but he threw it at the victim after she laughed at him.

Based upon the proof summarized above, the jury found the defendant guilty of first degree premeditated murder and aggravated arson. (FN5)

The trial proceeded to the sentencing phase on the conviction for first degree murder. The State presented only one witness, Detective Ed Forester who had investigated and obtained warrants for Hall's arrest for the burning of the victim's car on April 1 and 6, 1991. (FN6) According to Forester, at the time of the victim's murder, the defendant was aware that he was a suspect in the April 1 and 6 incidents. Forester also testified that the victim had given a statement following the April 6 fire in which she said that Hall previously had threatened to kill her and to "total" her car, and, on one prior occasion, actually had tried to force her off the road. (FN7)

The proof for the defense at sentencing included the testimony of Dr. Roger Meyer, a clinical psychologist, who evaluated the defendant after his arrest for this murder. Dr. Meyer interviewed Hall for three hours and reviewed the results of tests administered to Hall by one of Dr Meyer's associates.

Dr. Meyer testified that a mental status examination revealed that the defendant was not insane or psychotic. A Slosson Intelligence test indicated that the defendant's IQ was eighty-seven, and that his mental age was thirteen years, eleven months. The defendant's basic skills, as measured by a Wide Range Achievement test, showed a grade level 6 to 9 education in the general areas of reading, spelling, and arithmetic. A neuropsychological examination did not reveal any evidence of significant neurological trauma to Hall's brain. A sixteen-factor personality test revealed that Hall is introverted, emotionally unstable, easily influenced, and has low self-esteem. According to Dr. Meyer, the test reflects that the defendant has little self-control and is not rule abiding or moralistic. Though the defendant is not a psychopath or sociopath, Dr. Meyer opined that Hall has problems controlling rage and anger.

A Rorschach "Ink Blot" test showed that Hall has a great deal of difficulty reacting appropriately to stressful situations. Dr. Meyer described Hall and the victim's relationship as an "emotional tug of war," and said that it would have created a great deal of tension and frustration in a person with the defendant's psychological makeup. Though some of the test results indicated that the defendant was "faking bad" or malingering, Dr. Meyer explained that such results do not necessarily mean that a patient is faking, but can also reflect that a patient is simply overemphasizing the stress and emotional problems he or she is experiencing.

Dr. Meyer diagnosed the defendant as suffering from borderline personality disorder. Dr. Meyer testified that persons with this disorder characteristically have severe emotional problems and problems with thinking *687 and judgment. Dr. Meyer also concluded that the defendant suffered from post-traumatic stress disorder, but admitted that it may have resulted from the circumstances of the victim's death.

On cross-examination, Dr. Meyer testified that the defendant is not mentally retarded. He also conceded that his conclusions about the defendant's mental condition were based, at least in part, upon a typographical error indicating that the defendant's IQ was seventy-eight (78), rather than eighty-seven (87). Despite his reliance upon this erroneous information, Dr. Meyer did not revise his conclusions about the defendant. He restated his diagnosis that the defendant exhibited signs often associated with borderline personality disorder and post-traumatic stress disorder and said that the defendant was under extreme emotional distress when he committed the murder in this case.

Dr. Meyer admitted, however, that he did not discuss the facts of the murder with the defendant, but considered only the events which occurred before and after the killing in making his diagnosis. Dr. Meyer also did not reconsider his diagnosis after receiving an investigator's report which chronicled the defendant's behavior since childhood. Dr. Meyer admitted that the behavior described in the report would support a diagnosis of antisocial personality disorder. The behavior included the defendant's burning of his own bed in 1972, setting fire to his mother's boyfriend's car seat in 1973, setting fire to a wooded area in 1975, driving under the influence of an intoxicant, fighting, sneaking up on his mother's boyfriend with a knife, and truancy.

In addition to Dr. Meyer's testimony, the defense also presented proof about the relationship between Hall and the victim and about the defendant's abuse of drugs and alcohol. For example, Green testified that the victim and the defendant had a "rocky" relationship and that the defendant abused alcohol, marijuana, and crack cocaine. The defendant's cousin testified that Hall came to live with him in Oklahoma in December of 1990 seeking employment and recovery from drug abuse, but the victim telephoned, and shortly thereafter, Hall returned to Tennessee.

Christie Griffin, the defendant's step-sister, testified that Hall was very sad when he and the victim were at odds, but always believed they could work through their problems. According to Griffin, Hall and the victim had been out together several times following their separation in the weeks prior to the murder. Griffin stated on cross-examination that she observed the defendant hiding his shirt when he returned to his mother's home on the night of the victim's murder. In fact, Griffin had told the police where the shirt had been hidden.

The defendant's brother, David Hall, said that the defendant and the victim argued once a week, and the victim would address the defendant in abusive and vulgar language. According to his brother, the defendant was abusing crack cocaine during the time period of the murder, and had been for sometime prior to the murder. To support that drug habit, Hall would borrow money and pawn property.

The defendant's mother, Sarah Griffin, testified that her family had moved several times when Hall was young. When Hall's family moved to Alabama, he was only fourteen years old, but he remained in the Chattanooga area, residing with another family for three years until his own family returned. According to Hall's mother, the victim and her son began having problems two years before the murder. The couple had separated and reconciled on several occasions. She recalled that in December of 1990, the defendant moved to Oklahoma, where he planned to find employment and help for his drug problem, but returned in early January of 1991 to reconcile with the victim. During the separation preceding the murder, Griffin testified that Hall was very upset and would often cry and drink alcohol in excess. Although the victim and the defendant were separated, they had been out together several times in the weeks before the murder. According to Griffin, Hall was a "basket case" when he was unable to see the victim.

Finally, the defense introduced medical records and insurance forms to establish that the victim had undergone two abortions in ***688** 1985 and one abortion in 1990. The prosecution, in rebuttal, presented the testimony of a friend of the victim who related that Hall was aware of one of the abortions in 1985 and had encouraged the victim to undergo the procedure.

Based upon the proof, the jury determined that the State had proven the existence of two aggravating circumstances beyond a reasonable doubt (1) "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;" and (2) "[t]he murder was committed while the defendant was engaged in committing or was attempting to commit, arson." Tenn.Code Ann. § 39-13-204(i)(5) and (7) (1991). In addition, the jury found that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt, and as a result, sentenced the defendant to death by electrocution. The trial court entered a judgment in accordance with the jury's verdict and the Court of Criminal Appeals affirmed. After reviewing the record and considering the errors assigned by the defendant, we affirm the judgment of the trial court and Court of Criminal Appeals.

EXPERT TESTIMONY

In this Court, the defendant first contends that he is entitled to a new trial because during the guilt phase of the trial, the trial court refused to admit the expert proof regarding his mental state at the time the offense was committed. The defendant asserts that the testimony of Dr. Roger Meyer was relevant to negate intent, an essential element of premeditated first degree murder, (FN8) the offense for which the defendant was convicted. Exclusion of the relevant evidence constitutes prejudicial error, the defendant argues, and entitles him to a new trial. The State responds that the trial court properly excluded Dr. Meyer's testimony at the guilt phase because the defendant's proffer failed to inform the trial court that the testimony was being offered to negate intent. The State also asserts that the substance of Dr. Meyer's testimony was not relevant to show that the defendant lacked the capacity to form the requisite intent to commit premeditated first degree murder.

In resolving this issue we must revisit a principle recently endorsed by this Court in *State v. Abrams,* 935 S.W.2d 399 (Tenn.1996). In that case, we approved the "general holding" of *State v. Phipps,* 883 S.W.2d 138, 149 (Tenn.Crim.App.1994), that "evidence of a defendant's mental condition can be relevant and admissible in certain cases to rebut the mens rea element of an offense." *Abrams,* 935 S.W.2d at 402. We deferred until "another day" further development of the rule of " 'diminished capacity.' " *Id.* Another day has arrived.

[1][2] We begin with a brief historical review. The rule of diminished capacity originated in Scotland more than a century ago and was designed "to reduce the punishment of the 'partially insane' from murder to culpable homicide, a non-capital offense." *State v. Wilcox,* 70 Ohio St.2d 182, 436 N.E.2d 523, 525 (1982). The doctrine was widely accepted in other countries before it gained acceptance in American jurisdictions. *Id.* In modern application, diminished capacity is not considered a justification or excuse for a crime, but rather an attempt to prove that the defendant, incapable of the requisite intent of the crime charged, is innocent of that crime but most likely guilty of a lesser included offense. *United States v. Cameron,* 907 F.2d 1051, 1067 (11th Cir.1990). Thus, a defendant claiming diminished capacity contemplates full responsibility, but only for the crime actually committed. *State v. Padilla,* 347 P.2d 312 (N.M.1959). In other words, "diminished capacity" is actually a defendant's presentation of expert, psychiatric evidence aimed at negating the requisite culpable mental state. "Properly understood, it is ... not a defense at all but merely a rule of ***689** evidence." *United States v. Pohlot,* 827 F.2d 889, 897 (3rd Cir.1987).

It was that proper description of "diminished capacity" that was adopted by the Court of Criminal Appeals in *Phipps.* Indeed, while recognizing that diminished capacity is not an enumerated defense under the 1989 revision of the criminal code. *See* Tenn.Code Ann. §§ 39-11-501--621 (1991 Repl. & Supp.1996), the Court of Criminal Appeals in *Phipps* concluded that a defendant's capacity to form the requisite mental state to commit an offense is an issue in criminal prosecutions because the general criminal law in Tennessee provides that "[n]o person

may be convicted of an offense unless ... [t]he culpable mental state required is proven beyond a reasonable doubt," Tenn.Code Ann. § 39-11-201(a)(2) (1991 Repl.). We agree with that conclusion, and in addition observe that the negation of an element of a criminal offense is recognized as a defense in Tennessee. Tenn.Code Ann. § 39-11-203(e)(2) (1991 Repl & Supp.1996) ("A ground of defense, *other than one (1) negating an element of the offense* ... ") (emphasis added).

[3] Under Tennessee law, evidence is deemed relevant if it tends to "make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Tenn. R. Evid. 401 Moreover, relevant evidence is generally admissible in Tennessee, unless its probative value is substantially outweighed by its prejudicial effect. Tenn. R. Evid. 402 and 403. Since the general criminal law requires that mental state be proven by the State beyond a reasonable doubt, it is certainly a "fact of consequence" to the outcome of a criminal prosecution. Therefore, evidence which tends to prove or disprove the required mental state is relevant and generally admissible under Tennessee law.

[4][5] In addition to the general relevance rules, expert testimony in Tennessee is governed by Rule 702, Tenn. R. Evid. which provides:

> If scientific, technical, or other specialized knowledge will substantially assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise.

Under this evidentiary rule, expert testimony regarding the defendant's incapacity to form the required mental state must "substantially assist the trier of fact to understand the evidence or to determine a fact in issue." *See State v. Shuck,* 953 S.W.2d 662 (Tenn.1997). Though the facts or data upon which the expert testimony is based need not be admissible in evidence, they must be made known to the expert at or before the hearing and must be of a type reasonably relied upon by experts in the particular field. Rule 703, Tenn. R. Evid. In fact, under Tennessee law, "[t]he court shall disallow testimony in the form of an opinion or inference if the underlying facts or data indicate lack of trustworthiness." Rule 703, Tenn. R. Evid. Of course, as with most other evidentiary questions, the admissibility of expert opinion testimony is a matter which largely rests within the sound discretion of the trial court. *State v. Ballard,* 855 S.W.2d 557, 562 (Tenn.1993).

[6][7] Therefore, to gain admissibility, expert testimony regarding a defendant's incapacity to form the required mental state must satisfy the general relevancy standards as well as the evidentiary rules which specifically govern expert testimony. Assuming that those standards are satisfied, psychiatric evidence that the defendant lacks the capacity, because of mental disease or defect, to form the requisite culpable mental state to commit the offense charged is admissible under Tennessee law. As the intermediate court recognized

> [t]o find otherwise would deprive a criminal defendant of the right to defend against one of the essential elements of every criminal case. In effect, then, such a finding would deprive the defendant of the means to challenge an aspect of the prosecution's case and remove the burden of proof on that element in contravention of constitutional and statutory law. While the law presumes sanity it does not presume mens rea. Due process requires ***690** that the government prove every element of an offense beyond a reasonable doubt.

Phipps, 883 S.W.2d at 149. To avoid confusion, however, we caution that such evidence should not be proffered as proof of "diminished capacity." Instead, such evidence should be presented to the trial court as relevant to negate the existence of the culpable mental state required to establish the criminal offense for which the defendant is being tried. (FN9)

[8] As did the Court of Criminal Appeals in this case, we emphasize that the psychiatric testimony must demonstrate that the defendant's inability to form the requisite culpable mental state was the product of a mental disease or defect, not just a particular emotional state or mental condition. It is the showing of a lack of *capacity* to form the requisite culpable mental intent that is central to evaluating the admissibility of expert psychiatric testimony on the issue. *State v. Shelton,* 854 S.W.2d 116, 122 (Tenn.Crim.App.1992), perm. app. denied (Tenn.1993). Applying the above stated principles to the facts of this case, we conclude that the trial court did not err in excluding the testimony of Dr. Meyer.

[9] After the State rested its case-in-chief in the guilt phase of the trial, defense counsel requested the trial court to rule on whether or not Dr. Meyer's testimony could be admitted. The trial court inquired about the nature of the testimony and the purpose for which it was being offered. The following discussion ensued.

> [DEFENSE COUNSEL]: Talking about the type of individual that--what his testing revealed about the defendant in this case, and then take him to the situation where--I mean there's going to be proof--there's already been proof put on about alcohol consumption, and what that consumption--what effect that consumption would have had on him with his type of personality, in addition to exploring his state of mind, given his personality makeup, posing facts that have been presented here in court about the incident and how it occurred, what his expert opinion would be about how he would react under those circumstances.
>
> [THE COURT]: *I don't understand--of course, state of mind is important if it goes to a defense. If it goes to negating key elements in the case--*
>
> [DEFENSE COUNSEL]: Intent, Your Honor.
>
> [THE COURT]: But just general state of mind, what his feelings are, what his attitude was toward the victim in general, I don't see how that particular state of mind contributes toward a

defense. I assume at this time, based on what I've heard up to this point, his defense is intoxication, and he could not form the requisite intent to premeditate and deliberate and commit an intentional murder. Is that correct?

[DEFENSE COUNSEL]: Well, it's not only with reference to intoxication, but it's also with reference to emotional distress and stress that was produced by the relationship between the parties.

(Emphasis added.)

After further discussions, the trial court ruled as follows:

Anything going towards state of mind that would create a defense or an excuse for this killing, the Court will allow. But just a general state of mind of the defendant about attitudes toward the deceased, I don't think it's relevant at this time. I don't think it's admissible. I'm not going to allow that testimony about drugs and whatever between the two people just to show generally what the defendant was thinking, unless it goes specifically toward a defense. And, as I understand what you said, it does not.

***691** Also, the law of the State of Tennessee does not recognize diminished capacity in this state. And the only relevancy I see as far as the doctor's testimony would be going toward insanity as a defense in this case and not as to diminished capacity.

Now, as far as the defense of intoxication, if there is credible testimony from the doctor and he can give an opinion as to the extent of the **state** of intoxication of Mr. **Hall** at the time of commission of the offense, then that would be relevant, but just general stress or general attitude toward life would not be a defense in this case. *Any testimony going toward the defense of intoxication, I will allow....*

(Emphasis added.)

[10][11] Following this ruling, the defense did not attempt to present Dr. Meyer's testimony as an offer of proof, nor did the defense make any further statement about the nature and purpose of the testimony. (FN10) It is clear from this ruling that the trial court did not bar Dr. Meyer from testifying, but actually stated that he would allow testimony probative either to negate intent or to establish intoxication. In fact, the trial court recognized, without the benefit of appellate court decisions, that expert testimony relevant to negating intent is admissible in Tennessee even though diminished capacity is not a defense. (FN11) Moreover, the trial court correctly applied that legal principle to the testimony in this case. From the description of the expert testimony offered by the defense, as well as a review of the testimony of Dr. Meyer at the penalty phase, it is clear that Dr. Meyer's testimony was not relevant to show that the defendant lacked the capacity to form the requisite intent because of mental disease or defect or intoxication.

[12] Instead, Dr. Meyer testified generally about the defendant's personality type and character traits which he gleaned from tests results and a single three hour interview. At no point in his testimony did Dr. Meyer state that the defendant lacked the capacity to premeditate and deliberate the killing because of a mental disease or defect. Though Dr. Meyer testified at the penalty phase that he believed the defendant to have a borderline personality disorder and that such people could have brief episodes of rage during "temporary states of mental illness," he did not state that the defendant was experiencing such an episode when he committed the murder for which he was on trial. In fact, had Dr. Meyer made such a statement it would have been suspect since he acknowledged that he never discussed the facts of the murder with the defendant. (FN12) While evidence that a particular defendant, because of a mental disease or defect, lacks the capacity to form the requisite intent is admissible in Tennessee, expert opinion testimony about the typical reactions of certain personality types is not relevant to the capacity of the particular defendant on trial. *Compare Ballard,* 855 S.W.2d at 561 (expert testimony describing the typical behavior of a sexually abused child does not substantially assist a jury in an inquiry of whether the specific crime charged has actually taken place). Moreover, proof of personality type is not relevant to a defendant's *capacity* to form the mental intent. As Judge Tipton correctly stated in the decision of the Court of Criminal Appeals in this case:

Society is comprised of myriad individuals with diverse personalities and temperaments who are jointly and severally bound ***692** by society's common codes of conduct and responsibility. The mere fact that one is more apt, by personality type, to become emotional in response to a particular stimulus does not provide a means for that person to be absolved from the same responsibility to which the law holds another who might be less apt to respond as passionately to the same stimulus. If it did, then each person would be the law unto him or herself based solely upon his or her particular personality makeup.

Though expert testimony is admissible to show that because of a mental disease or defect, a defendant lacked the capacity to form the mental state required to constitute the offense for which he or she is being tried, the testimony in this case did not meet that standard. The trial court appropriately excluded the evidence.

AGGRAVATING CIRCUMSTANCES

The defendant next challenges the validity of the aggravating circumstances found by the jury. First, he argues that unconstitutional double counting exists in this case because the separate aggravating circumstances were proven by the same underlying facts, the burning of the victim's car. Secondly, he asserts that the jury's finding that the murder occurred in the perpetration of a felony is inconsistent with its verdict of premeditated first degree murder, and he urges that there was not a sufficient nexus between the felony and the homicide.

[13] In *State v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992) (Drowota and O'Brien, JJ., dissenting), a majority of this Court concluded that when a defendant is "convicted of first-degree murder solely on the basis of felony murder, the

aggravating circumstance set out in Tenn.Code Ann. §§ 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991) does not narrow the class of death-eligible murderers sufficiently under the Eighth Amendment to the United States Constitution, and Article I, § 16 of the Tennessee Constitution *because it duplicates the elements of the offense.* " The decision in *Middlebrooks* was based upon the narrow principle that an aggravating circumstance may not duplicate the elements of the underlying death-eligible offense. Contrary to the defendant's assertion, *Middlebrooks* did not embrace the broad principle of double counting, which has been adopted by the Florida courts, (FN13) and which precludes the use of the same evidence to establish more than one aggravating circumstance. *See State v. Bush,* 942 S.W.2d 489, 505 (Tenn.1997) (holding that use of murder to prevent arrest aggravating circumstance was appropriate because it did not duplicate the statutory elements of the underlying offense); *State v. Stephenson,* 878 S.W.2d 530, 556-57 (Tenn.1994) (holding that use of the murder for renumeration aggravating circumstance was appropriate because it did not duplicate the statutory elements of the underlying offense). In any event, we observe that the jury's finding of the two aggravating circumstances, (1) "[t]he murder was especially heinous, atrocious or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death;" and (2) "[t]he murder was committed while the defendant was engaged in committing or was attempting to commit, arson," Tenn.Code Ann. § 39-13-204(i)(5) and (7) (1991), were not based upon the same evidence. The jury's finding of the (i)(5) circumstance was based upon the torturous means by which the defendant chose to kill the victim, and the suffering she endured prior to her death. The jury's finding of the (i)(7) circumstance was based upon the defendant's commission of the murder during the perpetration of a separate felony, the destruction of the victim's car by arson.

[14] As to the defendant's contention that the finding of the felony murder aggravating circumstance is inconsistent with its verdict of premeditated murder, we disagree. As previously explained, in *Middlebrooks* a majority of this Court held that application of the felony murder aggravating circumstance is inappropriate only if the defendant is convicted *solely* on the basis of felony murder. Implicit in that statement is the recognition that the circumstance properly may be applied if a defendant is convicted of premeditated first degree murder. In fact, we recognized ***693** in *State v. Hurley,* 876 S.W.2d 57, 70 (Tenn.1993), that premeditated and felony murder are simply alternative means by which the offense of first degree murder may be committed. While a defendant who murders one victim may only be convicted of one offense of first degree murder, the circumstances of a particular case may support a jury finding that the *offense* of first degree murder was committed both with premeditation and during the course of perpetrating another felony. Tenn.Code Ann. § 40-18-112 (1990 Repl.). (FN14) Indeed, that was the situation in *Hurley* where we affirmed the defendant's conviction of premeditated first degree murder and his death sentence based upon the felony murder aggravating circumstance.

In this case, the defendant admitted that he intended to burn the victim's car, while at the same time denying that he intentionally, with premeditation and deliberation, killed the victim. The jury convicted the defendant of both aggravated arson and premeditated first degree murder, obviously disbelieving his assertions that he did not intend to kill the victim. The fact that the victim's murder was accomplished by pouring gasoline onto her body at the same time as gasoline was applied to the car to accomplish the underlying felony does not vitiate the applicability of the aggravating circumstance. In fact, application of the felony murder aggravating circumstance is particularly appropriate in this case. The defendant relentlessly searched for the victim's car intending to burn it. When he found the object of his search with the victim inside, the defendant achieved his original purpose, arson of the victim's car. When the victim would not heed his warning to leave the car, the defendant refused to be deterred from his original purpose and then proceeded, with premeditation and deliberation, to murder the victim by pouring gasoline directly onto her body and igniting the accelerant. The defendant's relentless determination to commit the arson of the victim's car ultimately culminated in his decision to kill her. Accordingly, the evidence is sufficient to support the jury's finding that the premeditated murder in this case was committed while the defendant was also engaged in committing arson.

[15] The defendant's claim that there is an insufficient nexus between the arson and the murder is without merit. In *State v. Terry,* 813 S.W.2d 420 (Tenn.1991), the defendant, a church pastor, embezzled substantial sums of money from his congregation over a period of time. He began taking the money in March of 1987, In June of 1987, he killed the church handyman, placed the body inside the church building, and torched the building. At the sentencing hearing, the jury found the felony murder aggravating circumstance on the basis of the underlying larceny. The trial judge granted the defendant's motion for a new trial, finding that the State had failed to prove that the murder was committed while the defendant was engaged in the perpetration of larceny. This Court agreed with the trial judge that there was an insufficient nexus between the murder and the larceny. In so holding, we stated that application of the felony murder aggravating circumstance depends upon the temporal, spatial and motivational relationships between the capital murder and the collateral felony. *Id.* at 423.

Applying those factors to the circumstances of this case, it is clear that the defendant's argument is without merit. Here, the capital murder and collateral felony occurred at the same time and in the same place. The defendant's motivation for killing the victim in this case and burning her car were likewise the same, anger over her decision to discontinue their relationship.

We conclude that the evidence is sufficient to support the jury's findings as to aggravating circumstances. We also conclude that the aggravating circumstances were constitutionally applied in this case.

**694 NONSTATUTORY MITIGATING*

CIRCUMSTANCES

In 1989, the General Assembly amended the capital sentencing statute to provide, with respect to nonstatutory mitigating circumstances, as follows:

> After closing arguments in the sentencing hearing, the trial judge shall include in the instructions for the jury to weigh and consider any of the statutory aggravating circumstances set forth in subsection (i) which may be raised by the evidence at either the guilt or sentencing hearing, or both. The trial judge shall also include in the instructions for the jury to weigh and consider any mitigating circumstances raised by the evidence at either the guilt or sentencing hearing or both which shall include, but not be limited to, those circumstances set forth in subsection (j). No distinction shall be made between mitigating circumstances as set forth in subsection (j) and those otherwise raised by the evidence which are specifically requested by either the state or the defense to be instructed to the jury. These instructions and the manner of arriving at a sentence shall be given in the oral charge and in writing to the jury for its deliberations.

Tenn.Code Ann. § 39-13-204(e)(1) (1991 Repl. & 1996 Supp.).

In this Court, the defendant argues that the trial court violated that statute by refusing to instruct the jury with respect to nonstatutory mitigating circumstances. The offense for which the defendant was tried and convicted was committed after November 1, 1989, so the above statute is without question applicable to his case. However, the case was tried before this Court's decision in *State v. Odom,* 928 S.W.2d 18 (Tenn.1996), in which we first interpreted the amended statute to require jury instructions on nonstatutory mitigating circumstances raised by the evidence and proffered by a defendant as having mitigating value. There, we stated that instructions on nonstatutory mitigating circumstances must not be fact specific and imply to the jury that the judge has made a finding of fact. Instead, such instructions must be drafted so that they are indistinguishable from the statutory mitigating circumstances when considered by a jury. *Id.* at 32. Finally, we interpreted the "no distinction" portion of the statute to preclude the trial judge from revealing to the jury that a request for instruction on nonstatutory mitigating circumstances has been made, and from revealing the identity of the party making the request. *Id.* More recently, in *State v. Hodges,* 944 S.W.2d 346 (Tenn.1997), we stated that nonstatutory mitigating circumstances must be phrased in general categories similar to the statutory mitigating circumstances, and we emphasized that a trial judge has no duty to give such instructions absent a timely and proper request from the defense. If the defense proffers a timely, but overly specific requested instruction, the trial court must revise and generalize the instruction to conform to the evidence and the law. *Id.* at 356.

Of course, the trial court in this case ruled without the benefit of our decisions in *Odom* and *Hodges.* In denying the defendant's requests, the trial court relied upon decisions of this Court interpreting pre-1989 law which found no constitutional or statutory provision mandating instruction on nonstatutory mitigating circumstances. *State v. Thompson,* 768 S.W.2d 239 (Tenn.1989); *State v. Wright,* 756 S.W.2d 669 (Tenn.1988). The defendant argues that he is entitled to a new sentencing hearing because the trial court's denial of his request constitutes prejudicial error.

The State argues that the trial court's refusal to charge the jury on nonstatutory mitigating circumstances does not require reversal. The State first points to a statute enacted while this case has been pending on appeal and effective April 29, 1997, which amends Tenn.Code Ann. § 39-13-204(e)(1), quoted above, by deleting the sentence "No distinction shall be made between mitigating circumstances as set forth in subsection (j) and those otherwise raised by the evidence which are specifically requested by either the state or the defense to be instructed to the jury" and substituting instead the following language at the end of subsection (e)(1): "However, a reviewing court shall not set aside a sentence of death or of imprisonment ***695** for life without the possibility of parole on the ground that the trial court did not specifically instruct the jury as to a requested mitigating factor that is not enumerated in subsection (j)." 1997 Tenn. Pub. Acts, Chapter 139. While conceding that the statute was not applicable at the trial of this cause, the State nonetheless argues that the provision precluding a reviewing court from setting aside a sentence of death on the ground that the trial court did not instruct the jury on nonstatutory mitigating circumstances is binding in this appeal and prevents this Court from granting relief to the defendant, even if it concludes that the failure to charge nonstatutory mitigating circumstances constitutes error which affirmatively appears to have affected the verdict. *Hodges,* 944 S.W.2d at 352; Tenn. R.Crim. P. 52(a). Even if this Court determines that Public Chapter 139 does not apply to the appeal of this case, the State argues that the defendant is not entitled to relief because the trial court's refusal to give instructions on nonstatutory mitigating circumstances was harmless error. For the reasons that follow, we conclude that the error was harmless and does not require reversal. (FN15)

[16] In this case, the defendant submitted seventy-one special requests for jury instructions at trial, many of which purported to explain the role and purpose of mitigating circumstances to the jury. Though the trial court refused to grant any of the defendant's requested instructions on nonstatutory mitigating circumstances, he granted five (FN16) of the other requested instructions, one which stressed that the sentencing decision was to be made by each individual juror; one which emphasized that the defendant was entering the penalty phase of the trial with the presumption that there were no aggravating circumstances warranting a sentence of death; and three other instructions which broadly defined and explained the nature and function of mitigating circumstances. With respect to the remaining sixty-six special requests the trial court stated, "I found that many of them are already included in the charge that the Court is giving ... or some of them are what I felt like are ... repetitious.... And I've also found that many of them are not appropriate as far as accurate statements of the law."

Implicitly conceding the accuracy of the trial court's finding with respect to duplicity, in this

Court the defendant points to only seven requested instructions on nonstatutory mitigating circumstances which he says the trial court erroneously refused to charge. They are as follows:

Special Request No. 20. In determining the sentence for Leroy Hall, Jr. you shall consider as a mitigating circumstance the fact that Leroy Hall, Jr., was immature for his age, and lacked the normal emotional development at the time of the commission of the crime. This may be sufficient by itself to impose the punishment of life imprisonment and reject death by electrocution.

Special Request No. 21. In determining the sentence for Leroy Hall, Jr. you shall consider as a mitigating circumstance the fact that Leroy Hall, Jr.'s criminal activity was caused by various psychological factors and alcohol-related problems that can be treated and will diminish with age. This may be sufficient by itself to impose the punishment of life imprisonment and reject death by electrocution.

Special Request No. 26. In determining the sentence for Leroy Hall, Jr. you shall consider as a mitigating circumstance the fact that Leroy Hall, Jr. suffers from post- *696 traumatic stress disorder even though it did not cause the crime. This may be sufficient by itself to impose the punishment of life imprisonment and reject death by electrocution.

Special Request No. 27. In determining the sentence for Leroy Hall, Jr. you shall consider as a mitigating circumstance the fact that Leroy Hall, Jr. at a very early age, exhibited signs of mental or emotional disturbance that went untreated. This may be sufficient by itself to impose the punishment of life imprisonment and reject death by electrocution.

Special Request No. 30. In determining the sentence for Leroy Hall, Jr. you shall consider as a mitigating circumstance the fact that.. Leroy Hall, Jr. never developed the ability to cope with daily tensions or to become self-dependent. This may be sufficient by itself to impose the punishment of life imprisonment and reject death by electrocution.

Special Request No. 37. In determining the sentence for Leroy Hall, Jr. you shall consider as a mitigating circumstance the fact that.. Leroy Hall, Jr. has for a long time had serious personality disorders that are, to a large extent, caused by the problems that developed in his childhood with his family. This may be sufficient by itself to impose the punishment of life imprisonment and reject death by electrocution.

Special Request No. 45. In determining the sentence for Leroy Hall, Jr. you shall consider as a mitigating circumstance the fact that Leroy Hall, Jr. has a history of family instability.

[17] Assuming the refusal to give these instructions, in some form, was error pursuant to our pronouncements in *Odom* and *Hodges,* we must determine whether the error affirmatively appears to have affected the verdict. A charge should be considered prejudicially erroneous if it fails to fairly submit the legal issues or if it misleads the jury as to the applicable law. *Hodges,* 944 S.W.2d at 352. In evaluating claims of error in jury instructions, the United States Supreme Court has cautioned reviewing courts to remember that

> [j]urors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-81, 110 S.Ct. 1190, 1198, 108 L.Ed.2d 316 (1990); *see also State v. Van Tran,* 864 S.W.2d 465, 479 (Tenn.1993). We review the following jury charge regarding mitigating circumstances to determine if it fairly submitted the legal issues to the jury in this case.

Mitigating Circumstances

Tennessee law provides that in arriving at the punishment, the jury shall consider as heretofore indicated, any mitigating circumstances which shall include, but are not limited to, the following:

(1) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(2) The youth or advanced age of the defendant at the time of the crime.

(3) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected his judgment.

(4) any other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing; that is, you shall consider any aspect of the defendant's character or record, or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

No distinction shall be made between mitigating circumstances one (1) through four (4) and those otherwise raised by the evidence.

The defendant does not have a burden of proving a mitigating circumstance. If there is some evidence that a mitigating *697 circumstance exists, then the burden of proof is upon the state to prove, beyond a reasonable doubt, that mitigating circumstance does not exist.

There is no requirement of jury unanimity as to any particular mitigating circumstance, or that you agree on the same mitigating circumstance.

Special Request No. 4: Decision to be Made by Individual Jurors:

Both the prosecution and Leroy Hall, Jr., are

entitled to the individual opinion of each juror. Each of you must consider the evidence for the purpose of reaching a verdict if you can do so. Each of you must decide the case for yourself, but should do so only after discussing the evidence and instructions with the other jurors. Do not decide any question in a particular way simply because a majority of the jurors, or any one of them, favors such a decision. Do not decide any issues in this case by chance, such as the drawing of lots or by any other chance determination.

Special Request No. 12: Presumption Regarding Aggravating Circumstances:

The defendant enters this phase of the trial with the presumption that there are no aggravating circumstances that would warrant a sentence of death. This presumption may be overcome only if the prosecution convinces you beyond a reasonable doubt that one or more of the specified aggravating circumstances exists and that the aggravating circumstance or circumstances outweigh any mitigating factors.

Special Request No. 57: Mitigation-Definition, Weight, Unanimity:

When you deliberate on the punishment for Leroy Hall, Jr., life imprisonment or death by electrocution, you must consider any mitigating circumstance supported by any evidence presented by either party at either the guilt-innocence or sentencing phase, or both, of the trial. A mitigating circumstance is any aspect of Leroy Hall, Jr's., character, background history, or physical condition or the nature and circumstances of the crime which in fairness or mercy, calls for a sentence less than death. If you find that there are any mitigating circumstances, you must decide how much weight they deserve. The law does not identify or limit what you can consider concerning Leroy Hall, Jr's., character, background history, and physical condition or the nature and circumstances of the crime that are mitigating. The law does not impose a formula for determining how much weight a mitigating circumstance deserves. Each of you is the sole judge of whether mitigating circumstances exist and if so, how much weight they deserve.

You may deliberate as a body about mitigating circumstances, but you are not required to reach a unanimous verdict as to their existence or weight. When you vote on whether any aggravating circumstances have been proven beyond a reasonable doubt to outweigh mitigating, each of you must decide for yourself whether any mitigating circumstances exist and, if so, how much weight they deserve.

Special Request No. 58: Mitigation-Definition:

Mitigating circumstances are factors put forth to show that the appropriate sentence is life imprisonment. Mitigating circumstances are not a justification or excuse for the offense, but are factors that, in fairness and mercy, may extenuate or mitigate the degree of moral culpability as far as punishment is concerned. Mitigating circumstances are not limited by the law; they may be unlimited in number, as long as they are based upon the evidence introduced by either the prosecution or the defense at the trial or sentencing.

Special Request No. 59: Mitigation-Definition:

A mitigating circumstance is not a justification or excuse for the offense. A mitigating circumstance is a fact about the offense, or about Leroy Hall, Jr., which in fairness, sympathy, compassion, or mercy may be considered in extenuating or reducing the degree of moral culpability, or which justifies a sentence of less than death, although it does not justify or excuse the offense.

***698** Clearly, the instructions on statutory mitigating circumstances given the jury in this case directly relate, and encompass generally the specific subject matter that is contained within the defendant's special requests. For example, circumstance (j)(7), (FN17) the youth of the defendant at the time of the crime directly relates to special requests twenty-one and twenty-two. Circumstance (j)(2), (FN18) and circumstance (j)(8), (FN19) relate to all of the requested instructions. Finally, the general instructions given by the trial court broadly informed the jury of its unlimited ability to consider all types of factors by defining mitigating circumstance as

> any aspect of Leroy Hall, Jr.'s, character, background history, or physical condition or the nature and circumstances of the crime which in fairness or mercy, calls for a sentence less than death.... The law does not identify or limit what you can consider concerning Leroy Hall, Jr.'s character, background history, and physical condition or the nature and circumstances of the crime [as] mitigating.

Though neither the statutory mitigating factors charged, nor the general instruction on mitigating circumstances were as specific as the defendant's special requests, the instructions generally encompassed the subjects contained within the special requests and fairly conveyed to the jury its ability to consider a wide range of proof as mitigating circumstances. In addition, the trial court permitted the defendant to introduce substantial proof of nonstatutory mitigating circumstances. Moreover, during closing argument at the sentencing phase, the trial court allowed defense counsel broad latitude to argue nonstatutory mitigating circumstances to the jury. In fact, counsel made detailed arguments regarding virtually every point of the mitigation on which he sought to have instructions given to the jury. (FN20) Therefore, considering the instructions actually given the jury on mitigating circumstances, in conjunction with the broad latitude appropriately afforded the defendant to introduce evidence and present argument about nonstatutory mitigating circumstances, we conclude that the trial court's refusal to charge the jury on nonstatutory mitigating circumstances does not constitute prejudicial error requiring a reversal. *See* Tenn. R.Crim. P. 52(a).

COMPARATIVE PROPORTIONALITY REVIEW

The defendant next claims that his sentence is disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and

the defendant. The defendant is asserting that his sentence is comparatively disproportionate because "[c]urrently there is no one under a death sentence in Tennessee who him- or herself murdered a girlfriend or spouse." The **State** responds that **Hall** is not the only person in Tennessee under a death sentence for the killing of a spouse or a girlfriend. We agree. *See State v. Johnson,* 743 S.W.2d 154 (Tenn.1987); *State v. Miller,* 674 S.W.2d 279 (Tenn.1984) ***699** and 771 S.W.2d 401 (Tenn.1989); *State v. Smith,* 868 S.W.2d 561 (Tenn.1993).

[18][19][20][21] Our comparative proportionality review does not end with that finding, however. Recently, in *State v. Bland,* 958 S.W.2d 651 (Tenn.1997), we analyzed in detail the precedent-seeking method this Court has employed over the past eighteen years in determining whether the death sentence imposed in a particular case is *disproportionate* to the sentence imposed in similar cases. In conducting comparative proportionality review, we begin with the presumption that the sentence of death is proportional to the crime of first degree murder. However, if a capital case, taken as a whole, is plainly lacking in circumstances consistent with those in similar cases in which the death penalty has been imposed, the sentence of death in the case being reviewed is disproportionate. *State v. Ramsey,* 864 S.W.2d 320, 328 (Mo. banc 1993). Even if a defendant receives a death sentence when the circumstances of the offense are similar to those of an offense for which another defendant has received a life sentence, the death sentence is not disproportionate if this Court can discern some basis for the lesser sentence given in the similar case. *See State v. Carter,* 714 S.W.2d 241, 251 (Tenn.1986). Moreover, where there is no discernable basis for the difference in sentencing, the death sentence is not necessarily disproportionate. This Court is not required to determine that a sentence less than death has never been imposed in a case with similar characteristics. To the contrary, our duty under the similarity standard is to assure that no aberrant death sentence is affirmed. *State v. Webb,* 680 A.2d 147, 203 (Conn. 1996). "Since the proportionality requirement on review is intended to prevent caprice in the decision to inflict the [death] penalty, the isolated decision of a jury to afford mercy does not render unconstitutional death sentences imposed on defendants who were sentenced under a system that does not create a substantial risk of arbitrariness or caprice." *Cf. Gregg v. Georgia,* 428 U.S. 153, 203, 96 S.Ct. 2909, 2939, 49 L.Ed.2d 859 (1976).

[22][23] As we had previously explained, and reaffirmed in *Bland,* comparative proportionality review is not a rigid, objective test. *Id.,* 958 S.W.2d at 662; *State v. Cazes,* 875 S.W.2d 253, 270 (Tenn.1994). We do not employ a mathematical formula or scientific grid, nor are we bound to consider only those cases in which exactly the same aggravating circumstances have been found by the jury. *State v. Brimmer,* 876 S.W.2d 75, 84 (Tenn.1994). After identifying a pool of similar cases, we consider a multitude of variables, some of which were listed in *Bland,* in light of the experienced judgment and intuition of the members of the Court. *Bland,* 958 S.W.2d at 667. With respect to the circumstances of the offenses relevant factors enumerated in *Bland* include: (1) the means of death; (2) the manner of death (e.g., violent, torturous, etc.); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on nondecedent victims. With respect to comparing the character of the defendants, the following factors were listed in *Bland* as relevant: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of helplessness of victim(s); (8) the defendant's capacity for rehabilitation.

[24] Considering the nature of the crime and the defendant, we conclude that imposition of the death penalty for the torturous and cruel premeditated killing of this young woman is not disproportionate to the penalty imposed in similar cases. Not only did Hall show a total disregard for human life, he exhibited complete indifference to human suffering. The twenty-two-year-old victim had cohabitated with the defendant since she was sixteen years old. In fact, it was her decision to end the relationship which proved fatal. For the three weeks following the ***700** separation and prior to her murder, the victim was consistently pursued by the defendant. He telephoned her residence at all hours of the day and night. He threatened her, stating at one point, "[i]f I can't have her, nobody can't." [sic] His mother described him as a "basket case" when he was unable to see her. Attempting to gain control over her, the defendant decided to destroy her means of transportation. While in the process of accomplishing that objective, Hall decided that destroying her life would more effectively and efficiently accomplish his purpose of preventing her from seeking a life apart from him. He demonstrated uncommon cruelty by choosing to murder his ex-girlfriend by igniting her gasoline soaked body. Hall by his own admission never offered assistance to the victim. The pain and suffering which the victim endured in the hours preceding her death is unimaginable. She was alive, conscious, coherent, and alert as her tongue swelled to the extent that it protruded from her mouth and her eyelids became inverted. She experienced not only the initial pain of the burn injuries, but also the pain from the incisions that were part of the medical treatment for the burns. The only provocation or motive for this horrendous killing was the defendant's anger with the victim for leaving him and refusing to return. Following the murder, Hall did not turn himself into the authorities and report the crime. Instead, he went to his mother's house and attempted to hide the shirt he had been wearing. Fortunately, his step-sister witnessed his attempt and later reported the location of the shirt to the police. When Hall initially spoke with the police, he denied involvement in the murder. Later, he admitted his involvement, but denied that he killed the victim with premeditation and deliberation. In fact he attempted to plead guilty to felony murder in front of the jury. The jury disbelieved his testimony and found the existence of premeditation and

deliberation. There is no evidence in this record to indicate that Hall had a prior criminal record; however, he admitted to abusing alcohol and drugs, and warrants had been issued for the defendant's arrest for the prior arson of the victim's car. With respect to his mental state, the evidence shows that he is a person prone to rage who has little self control. Though the precise psychological diagnosis may vary, the defendant clearly displayed symptoms of both borderline personality disorder and antisocial personality disorder. He was not insane at the time this crime was committed. Though Hall was young at the time of the killing, only twenty-four years old, he is not, by any means, the youngest person on death row. (FN21) Moreover, contrary to his assertion, he is not the only person in Tennessee to receive a death penalty for the killing of a spouse or a girlfriend. Considering the nature of this crime and the character of this defendant, this murder places Hall into the class of defendants for whom the death penalty is an appropriate punishment. Based upon our review, we conclude that the following cases in which the death penalty has been imposed have many similarities with this case.

In *State v. Johnson,* 743 S.W.2d 154 (Tenn.1987), the thirty-three year old defendant murdered his wife by forcing a large plastic garbage bag into her mouth which resulted in strangulation and asphyxiation. She bled from the nose and ears and traces of blood were found on a couch in the office where her death occurred. There was testimony that she would have been conscious during the terrifying ordeal and that from one to four minutes would have elapsed before she died. This Court stated that she suffered "a most terrible death," and declined to state all the "horrible details" of it. As in this case, the jury in *Johnson* found that the murder was "especially heinous, atrocious or cruel in that it involved torture or depravity of mind." Tenn.Code Ann. § 39-2-203(i)(5)(1982). As in this case, the jury also found a second, but different, aggravating circumstance, that the defendant had been previously convicted of violent felony offenses, armed robbery and aggravated assault. Tenn.Code Ann. § 39-2-203(i)(2)(1982). The only possible motive for the unprovoked killing was the defendant's ***701** desire to prevent his wife, who had previously threatened to leave him, from learning that he had been found in a compromising position with a woman a few weeks before the murder. As did the relationship of the victim and Hall in this case, the relationship between Johnson and his wife had a history of difficulties. Though Johnson denied the murder and attempted to place blame for the killing upon a prisoner who was on work release, the jury disbelieved Johnson and sentenced him to death by electrocution.

In *State v. Miller,* 674 S.W.2d 279 (Tenn.1984) and 771 S.W.2d 401 (Tenn.1989), the twenty-four-year-old defendant was sentenced to death for murdering the twenty-three-year-old victim he had been dating. The victim had been born with brain damage and was mildly retarded. The defendant killed the victim by beating and repeatedly stabbing her. Some of the wounds were inflicted before death and some after death. Some of the stab wounds extended so deep into the bone that the forensics testimony indicated that a hammer had been used to drive the knife as if it were a nail. The victim had also been raped. As in this case, the issue of intoxication from drugs and alcohol and whether its degree was sufficient to negate premeditation was a contested issue in the trial. The jury rejected Miller's proof and found him guilty of premeditated murder. The jury imposed the death penalty upon finding that the murder "was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Tenn.Code Ann. 39-2-203(i)(5) (1982)(repealed). The sentence was reversed on direct appeal by this Court because irrelevant and prejudicial evidence was admitted at the sentencing phase. However, at the resentencing hearing the jury again imposed the death penalty upon the basis of the (i)(5) aggravating circumstance and the sentence was affirmed upon appeal.

In *State v. Smith,* 868 S.W.2d 561 (Tenn.1993), the forty-year-old defendant was found guilty of the triple premeditated murders of his estranged wife, age thirty-five and her two sons by a previous marriage, age sixteen and thirteen. The jury sentenced the defendant to death on the murder counts as to all three victims. With respect to the killing of his estranged wife, the jury found two aggravating circumstances: (1) that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind, Tenn.Code Ann. § 39-2-203(i)(5) (1982), and (2) the defendant committed "mass murder" which is defined as the murder of three or more persons within the state of Tennessee within a period of forty-eight (48) months, and perpetrated in a similar fashion in a common scheme or plan, Tenn.Code Ann. § 39-2-203(i)(12) (1982). Like the defendant in this case, Smith harassed his estranged wife in the weeks prior to the murder. In fact, at the time of the killing, warrants had been issued charging the defendant with aggravated assault of the victim. Smith killed his wife by shooting her in the left arm and the neck. The gunshot to her neck had severed her spinal cord, producing paralysis and death within two to six minutes. Though she would have been able to hear during some portion of this time, Smith's victim would have been unable to move. Therefore, she may have been able to hear the sounds of her children being murdered. After her death, the defendant slashed her neck and stabbed her with a knife and an awl. In mitigation, the defendant offered proof to show that he had been a good prisoner, and in addition, several of his co-workers testified that he was a good employee. His mother and daughter said that he had a severely retarded teenage son who depended upon the defendant emotionally. As in this case, the defendant presented expert psychological proof that he had personality disorders.

In *State v. O'Guinn,* 709 S.W.2d 561 (Tenn.1986), the thirty-two-year-old defendant was convicted of the rape and strangulation death of a seventeen-year-old woman. The defendant and the victim met at a nightclub in Jackson, Tennessee. Both were intoxicated from alcohol and drugs. They left the bar together and rode around in the defendant's car. At some point, the defendant became angry with the victim and assaulted and murdered her. The victim suffered a horrible ordeal. She had offensive and defensive wounds to her chest, arms, and head, indicating that she had been severely and brutally ***702** beaten. The cause of her death was ligature

strangulation. She was choked to death with her halter top. A contusion with parallel bruises on either side of the nipple of her left breast might have been made by pliers or a similar object. A metal tire tool had been forcefully inserted into her vagina. Semen was also found in her vagina. Abrasions on her buttocks indicated that her body had been dragged across the ground. The injuries to her head, neck, breast, and vagina had occurred prior to her death. The jury convicted the defendant of first degree murder. At the sentencing hearing, the State introduced the photographs of the victim. The defendant's mother testified on her son's behalf and told how his father, from whom she had been divorced, had run the defendant from home when he was thirteen or fourteen years old. The defendant was divorced and had three children, and his former wife had engaged in an affair with his father. Upon finding one aggravating circumstance, that the murder was especially heinous, atrocious or cruel in that it involved torture or depravity of mind, Tenn.Code Ann. § 39-2-203(i)(5) (1982), the jury sentenced the defendant to death by electrocution.

In *State v. Henley,* 774 S.W.2d 908 (Tenn.1989), the jury imposed the death penalty after finding, as in this case, that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. Tenn.Code Ann. § 39-2-203(i)(5) (1982). Thirty-one-year-old Henley had been drinking and taking drugs on the day of the murder. He forced the victims, a married couple with whom he was acquainted, from the road to their house at gunpoint, demanding money. When the victims attempted to comply, Henley refused to take the money, and without provocation, shot the husband and then the wife. When the helpless, unresisting wife began moaning, Henley shot her two more times, poured gasoline on her body, and set the house on fire. Though the husband died from the gunshot wound, the wife died from burns and smoke inhalation.

As we have repeatedly emphasized, no two cases are identical, but the above cases have many similarities with Hall. In all five cases, the victims suffered particularly cruel and painful deaths. Though all murders are totally reprehensible, the means of death in this case was extremely heartless. In fact, it is difficult to conceive of a death more painful or torturous than that suffered by the victim in this case. In all of the cases, the defendants were acquainted with the victims, and in three of the five cases, like this case, the defendants received the death penalty for murdering their girlfriend or spouse. Like this case, in all of the five cases the victims remained conscious for some time after they were assaulted and experienced the pain from the injuries inflicted by the defendants. A motive for the murder in at least two of the cases was the defendant's desire to control his estranged wife. Likewise, one motive for the murder in this case was the defendant's desire to control the victim's life. In all five of the cases, the jury found that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. Similarly, in this case, the jury found that the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death. Like Hall, many of the defendants relied upon their youth and mental disabilities as mitigation of the punishment. In at least one other case, the issue of premeditation and deliberation was strongly disputed, and in three of the five cases, the defendants claimed to have been intoxicated at the time of the murders. After reviewing the cases discussed above and many other cases not herein detailed, we are of the opinion that the penalty imposed by the jury in this case is not disproportionate to the penalty imposed for similar crimes.

CONCLUSION

In accordance with the mandate of Tenn.Code Ann. § 39-13-206(c)(1) (1991 Repl.), and the principles adopted in prior decisions of this Court, we have considered the entire record in this cause and find that the sentence of death was not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstances, and the jury's finding that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. Tenn.Code Ann. *703 § 39-13-206(c)(1)(A)--(C) (1991 Repl. & 1996 Supp.). We have considered the defendant's assignments of error and determined that none require reversal. With respect to issues not specifically addressed herein, we affirm the decision of the Court of Criminal Appeals, authored by Judge Joseph M. Tipton, and joined in by Judge Gary R. Wade and Judge John H. Peay. Relevant portions of that opinion are published hereafter as an appendix. The defendant's sentence of death by electrocution is affirmed. The sentence shall be carried out as provided by law on the 22nd day of April, 1998, unless otherwise ordered by this Court or other proper authorities.

ANDERSON, C.J., and BIRCH and HOLDER, JJ., concur.

REID, J., separate concurring opinion.

APPENDIX

(Excerpts from the Court of Criminal Appeals' Decision)

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE
DECEMBER SESSION, 1993

State of Tennessee, Appellee,

v.

Leroy Hall, Jr., Appellant.

No. 03C01-9303-CR-00065
Hamilton County
Hon. Stephen M. Bevil, Judge
(First degree murder and aggravated arson)

For the appellant:

Karla G. Gothard
701 Cherry Street
Suite 300
Chattanooga, TN 37402

Scott, *Substantive Criminal Law*, . § 7.7 (1986)) (emphasis in original).

We conclude that, in the light most favorable to the prosecution, the evidence was sufficient for a rational trier of fact to conclude *705 beyond a reasonable doubt that the defendant was guilty of a premeditated and deliberated first degree murder. There was evidence that the defendant and the victim had a troubled relationship and were in the midst of a separation. The defendant, according to one witness, had made threats toward the victim, including telling Chris Mathis to the effect that no one could have her if he could not. The defendant admitted that, on the night of the killing, he was angry because he felt that the victim had lied to him.

The defendant's testimony included his procurement of materials used to commit the offense. He located a tea jug to fill with gasoline in order to burn the victim's car and he set out to find the victim. He related how he went to a gas station, filled the jug with gasoline, purchased a cigarette lighter and put paper towels in the opening of the jug. Also, the defendant's testimony clearly recounted his actions in searching for the victim. He went to the victim's place of employment and to her grandmother's house. He drove through the parking lots of numerous bars and nightclubs in his effort to find the victim. His testimony included the names of each establishment, the roads he traveled and his actions. Notwithstanding the defendant's testimony that he only intended to burn the victim's car, a rational trier of fact could infer planning activity from such evidence.

When finally locating the victim, he told her that he was going to burn her car, but he prevented her from leaving the scene or locking herself inside the car by taking her car keys. According to the defendant's own testimony, an argument ensued and he returned to his car to retrieve the gasoline jug. The defendant further admitted that he was aware the victim was lying prone on the front seat when he lit the gasoline jug and threw it into the car. The defendant fled the scene and later denied to police that he committed the offense.

We conclude that this evidence was sufficient for a rational trier of fact to find the elements of premeditation and deliberation beyond a reasonable doubt. The defendant's contentions that his actions were indicative of anger, passion and an intent to burn the victim's car are unavailing. The jury heard the defendant's testimony in this regard and could rationally conclude that his actions were consistent with an intent to kill and deliberation. Moreover, although the defendant testified that he had been drinking on the night in question, he recounted his actions and whereabouts with clarity and detail.

The defendant attacks certain aspects of the state's proof that purportedly demonstrate the elements of premeditation and deliberation and offers other inferences that could have been drawn. For instance, he argues that the evidence regarding the extent of the victim's injuries did not by itself establish premeditation. *See, e.g., Brown,* 836 S.W.2d at 546. He contends that the opinion testimony relative to the "pouring" of gasoline on the victim was speculative and inadmissible, and, in any event, not probative of the elements of the offense. He contends that the inference that he broke the driver's side window of the victim's car before setting it ablaze conflicted with testimony that the driver's door was open and that, in any event, such evidence would indicate anger, not deliberation. The defendant further argues that evidence relative to his prior threats against the victim must be viewed in contrast to the evidence that he and the victim continued to have contact with one another after their separation. Finally, he argues that evidence that he procured the materials with which to make the bomb was not probative of premeditation, but rather could have been done in a state of passion. *See, e.g., West,* 844 S.W.2d at 148.

Essentially, the defendant's contentions require a reweighing of the evidence, something this court may not do. That is, it is of no consequence that alternative inferences might exist depending upon what view of the evidence is made, because our review is limited to whether or not the jury's guilty verdict is rationally supported by the evidence when viewed in the light most favorable to the state. Under such a review, we conclude that the circumstances of the killing and the inferences that can be rationally drawn from the evidence by the jury are sufficient to *706 sustain the first degree murder conviction. T.R.A.P. 13(e); *Jackson v. Virginia,* 443 U.S. at 318, 99 S.Ct. at 2789.

II.

The defendant contends that the trial court erred in allowing evidence about the previous fires set to the victim's car on April 1, 1991 and April 6, 1991. He argues that said evidence was not relevant to a material trial issue and it was improperly used to prove that he committed the offenses on April 17, 1991. The state insists that the trial court's rulings with respect to evidence of the earlier fires were correct.

Testimony regarding fires to the victim's car on April 1st and April 6th 1991 was elicited through several witnesses. Gloria Mathis, the victim's grandmother, testified that the defendant had burned the victim's car twice before the offenses in question. The defendant objected based upon a lack of proof that the defendant committed either fire. The defendant requested that Ms. Mathis' statement be stricken from the record and that a curative instruction be issued or that the trial court grant a mistrial. The prosecution contended that the evidence of the earlier fires was intended to show the victim's state of mind and to show a "pattern of conduct by the defendant" through the similarity of the offenses.

The trial court ruled that it would allow testimony only about prior burnings that related to the defendant. The state assured the court that it would present a witness who would testify that the defendant had set the April 6th fire. The trial court overruled the defendant's objection relative to any evidence of prior fires "on the stipulation that if [the defendant's involvement is] disproven, [it would] sustain the motion for a mistrial." The trial court sustained the defendant's objection to Ms. Mathis' statement and instructed the jury to disregard the witness' statement that the car had been burned "twice before."

Ms. Mathis was then questioned about the April 6th fire but did not implicate the defendant as the person who had caused the fire. The trial court instructed the jury that Ms. Mathis' testimony relative to the April 6th fire was being admitted contingent upon it being made relevant at a later time. Her son, Chris Mathis, was later permitted to relate facts regarding the April 6th incident. In fact, it was Chris Mathis, an eyewitness, who connected the defendant to the April 6th fire. The defense, who had earlier noted an "ongoing objection," did not contemporaneously object to Chris Mathis' testimony.

Before the testimony of Viola Wylene Price, the prosecution advised the court that Price and Commander Earl Atchley of the Chattanooga Fire Department would relate statements made by the victim on the scene to the effect that the defendant had burned her car on two previous occasions. The prosecutor argued that the evidence was relevant to the victim's state of mind, insofar as she knew the defendant's prior acts and therefore would not have associated with him voluntarily. The defense again noted that such evidence of prior acts would lead the jury to conclude that the defendant had committed the acts for which he was being tried. The trial court ruled that the victim's statements were admissible as "excited utterances." *See* Tenn. R. Evid. 803(2). The court further ruled that it would instruct the jury that the statements were admitted to show the victim's existing state of mind but not "as to whether there were in fact two prior fires or whether there weren't two prior fires."

Price was allowed to testify that the victim told her that the defendant had tried to set fire "to her twice before." Likewise, Atchley testified that the victim said that the defendant had committed the offense and that he was the "same guy that set the automobile on fire on the 6th." The trial court, on each occasion, instructed the jury that the statements were "excited utterances," and not offered to prove the defendant committed the prior fires.

Ed Forester and Mike Donnelly testified relative to the prior fires in the course of their testimony about their investigations. Before Forester's testimony, the prosecution informed the trial court that the witness would relate his findings with regard to his April 1st and April 6th investigations. The ***707** state argued that the evidence was relevant to show the victim's state of mind with regard to her relationship with the defendant and to rebut the defendant's theory that the victim was with the defendant willingly on the night of her death. The defense objected on the grounds that Forester's statement that the victim suspected the defendant of the April 1st fire had nothing to do with her state of mind and that there had been no evidence connecting the defendant to the April 1st fire. The trial court sustained the defendant's objection relative to evidence of the April 1st fire, stating that it was too remote and that the victim's mere suspicion of the defendant for the April 1st fire was not enough to allow its introduction. The trial court also ruled that Forester could testify to the April 6th fire because there had been proof of the defendant's involvement. The court further noted that evidence of the April 6th fire had been admitted because "it was relevant and probative to the issue of premeditation and intent of the defendant when he ... set the fire on April the 17th, ... since there was proof that he himself actually set the fire."

Forester then testified that he had met the victim on April 1, 1991, and that he had investigated a fire to the victim's car on April 6, 1991. He related the details of the April 6th fire. At one point in this testimony, he refers to "both previous fires." The defendant later objected out of the presence of the jury but stated no basis for the objection. The trial court stated that it did not hear the reference to more than one previous fire and never ruled on the defendant's objection..

Donnelly testified that the investigation of the victim's car revealed evidence of "three separate and distinct fires." He added that he learned fires had been set to the car on April 1st and April 6th, in addition to the day of the offenses being tried. The defense objected to his testimony and moved for a mistrial on the basis of the cumulative references that had been made to the earlier fires. The trial court denied the mistrial motion because it did not think that the defendant had suffered any prejudice. However, the trial court offered a curative instruction for the jury to disregard the reference to the April 1st fire, but the defendant declined the instruction.

As the defendant correctly notes, evidence that an accused has committed some other crime or bad act independent of that for which he is charged is generally inadmissible, even though it may be a crime or act of the same character as that on trial. Tenn. R. Evid. 404(b); *State v. Howell,* 868 S.W.2d 238, 254 (Tenn.1993); *Bunch v. State,* 605 S.W.2d 227, 229 (Tenn.1980). However, if evidence that a defendant has committed a crime separate and apart from the one on trial is relevant to some matter actually in issue in the case on trial and if its probative value is not outweighed by the danger of its prejudicial effect, the evidence may be admitted. Tenn. R. Evid. 404(b); *Howell,* 868 S.W.2d at 254. Issues to which such evidence may be relevant include identity, motive, common scheme or plan, intent or the rebuttal of accident or mistake defenses. In *State v. Parton,* 694 S.W.2d 299, 301 (Tenn.1985), the supreme court stated that admissibility was also contingent upon the trial court finding clear and convincing evidence that the prior crime, wrong or act was committed by the defendant. *See, e.g., State v. Holman,* 611 S.W.2d 411, 412-13 (Tenn.1981).

As our previous recital of the facts indicates, the record does not provide a pattern of clear cut testimony, objections and rulings regarding the previous fires. Sometimes the defendant objected without specifying the basis of the objections, one time he claimed a continuing objection, while other times there was no specific objection made. The trial court's rulings were, similarly, often not specific. In this respect, we note that at no time did either of the parties refer to Rule 404(b) or request a jury-out hearing as provided by Rule 404(b) at which specific rulings upon each questioned proffer of evidence could be made. *See, e.g., State v. Bigbee,* 885 S.W.2d 797, 806 (Tenn.1994). As the rule indicates, the trial court was not obligated to conduct such a hearing absent a request. In any event, the ultimate result is that there is no record of a trial court analysis and determination regarding

issue relevance and potential prejudice.

*708 Nevertheless, as the state contends, the record indicates that the evidence of the previous fires is relevant to the defendant's motive and intent regarding his conduct for which he is now being tried. In this respect, we note that the trial court stated at one point that the April 6th fire was relevant to intent and premeditation. We agree. In *State v. Smith,* 868 S.W.2d 561 (Tenn.1993), the defendant objected to the introduction of evidence that he committed previous assaults against his estranged wife, one of the murder victims. The defendant claimed that the evidence violated Rule 404(b). The supreme court stated:

> In response to the Defendant's assertions that the evidence of the two episodes was irrelevant and inadmissible under Tenn. R. Evid. 404(b), the State cites a line of cases, *see, e.g., State v. Turnbill,* 640 S.W.2d 40, 46-7 (Tenn.Crim.App.1982); and *State v. Glebock,* 616 S.W.2d 897, 905-906 (Tenn.Crim.App.1981), which hold that *violent acts indicating the relationship between the victim of a violent crime and the defendant prior to the commission of the offense are relevant to show defendant's hostility toward the victim, malice, intent, and a settled purpose to harm the victim.* Also, in the present case, the victims, despite the Defendant's threats to kill them if they did so, had filed charges against the Defendant based on these prior assaults. The evidence of these violent episodes was admitted not to prove the Defendant acted in accord with his character but as part of the proof establishing his motive for the killings. The probative value of this evidence is not outweighed by the danger of unfair prejudice.

Smith at 574 (emphasis added) (citations omitted). We believe the facts in the present case are similar to those in *Smith.* The defendant committed prior acts of arson toward the victim and charges were brought. The defendant was aware of the charges. As in *Smith,* these facts were highly probative of the defendant's motive and intent. We conclude that the probative value of the evidence is not outweighed by the danger of unfair prejudice and was, therefore, admissible.

III.

The defendant argues that the trial court erred by admitting a photograph taken of the victim at an autopsy. He argues that the victim's appearance in the photograph had been altered by medical procedures and that the prosecution's expert witness, as well as lay witnesses, were able to describe the victim's condition without the use of photographs. The state contends that the photograph was relevant to show the nature of the victim's injuries and that the trial court did not abuse its discretion in this regard.

The record indicates that the prosecution sought to introduce a series of four photographs, contending that they accurately depicted the consistency of the burns received by the victim. Dr. Merriman testified that the photographs would best illustrate her testimony, although she conceded that she could describe the victim's condition, including her charred, hardened and discolored skin, without them. Dr. Merriman also admitted that the photographs, taken at the autopsy, did not reflect the victim's condition at the time of her admittance to the hospital. In this regard, she acknowledged that incisions had been made in the victim's skin and that fluids provided to the victim produced a swelling to her body, eyes, lips and tongue.

Nonetheless, the trial court ruled that one of the photographs, which depicted the victim's back as she lay on her side, was admissible, stating that it was representative of all the burns and was relevant to assist the jury in understanding the seriousness and degree of the burns. The trial court ruled that the other photographs, which more graphically depicted the victim's head, torso, face and extremities, were inadmissible because their probative value was outweighed by the danger of unfair prejudice.

The leading case regarding the admissibility of photographs of murder victims is *State v. Banks,* 564 S.W.2d 947 (Tenn.1978), in which the supreme court indicated that the determination of admissibility is within the discretion of the trial court after considering the relevance, probative value and potential *709 unfair prejudicial effect of such evidence. The general rule, as stated in *Banks,* is that "photographs of the corpse are admissible in murder prosecutions if they are relevant to the issues on trial, notwithstanding their gruesome and horrifying character." *Id.* at 950-951 (citing *People v. Jenko,* 410 Ill. 478, 102 N.E.2d 783 (1951)). On the other hand, "if they are not relevant to prove some part of the prosecution's case, they may not be admitted solely to inflame the jury and prejudice them against the defendant." *Banks,* 564 S.W.2d at 951 (citing *Milam v. Commonwealth,* 275 S.W.2d 921 (Ky.1955)).

Thus, even relevant evidence should be excluded if its probative value is substantially outweighed by the danger of unfair prejudice to the defendant. *Banks,* 564 S.W.2d at 951; *see also* Tenn. R. Evid. 403. In *Banks,* the court stated that "[t]he more gruesome the photographs, the more difficult it is to establish that their probative value and relevance outweigh their prejudicial effect." 564 S.W.2d at 951 (citation omitted). Also, it noted that autopsy photographs are often condemned "because they present an even more horrifying sight and show the body in an altered condition...." *Id.* (FN3)

In the present case, the admitted photograph did depict the victim in a different condition due to the treatment procedures that had been administered. This factor weighs against admissibility. *Banks,* 564 S.W.2d at 951. Likewise, the testimony of Dr. Merriman and several lay witnesses conveyed the graphic and extensive nature of the victim's burns and the extent of her injuries, further weighing against the admission of the photograph. *Id.* On the other hand, the trial court found that the photograph was relevant to "the seriousness and the degree of the burns." The trial court ruled that the photograph showed the nature of the injury and the consistency of the burns received by the victim. This, in turn, was relevant to an assessment of how the offense was committed by the defendant. We note that part of the prosecution's theory, as related by Dr. Merriman and Mike Donnelly, was that the victim's injuries were consistent with a dousing of

flammable material, and not just a splashing or splattering. In this regard, the evidence was relevant to the manner in which the offense occurred and to clarify testimony on the issue. *See, e.g., Banks,* 564 S.W.2d at 951. *See also Smith,* 868 S.W.2d at 576 (trial court did not abuse its discretion in allowing autopsy photograph of victim during guilt phase in part to illustrate testimony); *State v. Caughron,* 855 S.W.2d 526, 536 (Tenn.1993).

The trial court excluded several other photographs that were more graphic in nature on the ground that their probative value was substantially outweighed by the risk of prejudice to the defendant. By contrast, the photograph that was admitted was more limited in nature, revealing the victim's back as she lay on her side. Given the trial court's full consideration of this issue, as evidenced by its admission of one photograph and exclusion of several others, we conclude that the trial court did not abuse its discretion in this regard. *Banks,* 564 S.W.2d at 951. *See also Smith,* 868 S.W.2d at 576; *State v. Van Tran,* 864 S.W.2d 465, 477 (Tenn.1993); *Caughron,* 855 S.W.2d at 536; *Cazes,* 875 S.W.2d 253, 263 (Tenn.1994). It was not error for the trial court to admit this photograph.

IV.

The defendant contends that the trial court erred in allowing "misleading and speculative" opinion testimony about how gasoline was used in the homicide. In essence, Mike Donnelly, a Tennessee Fire Marshall arson investigator, gave his opinion that the gasoline had been "poured rather than thrown" onto the victim. The defendant contends that Donnelly's testimony does not meet the four-part test for admission of scientific expert *710 testimony provided in *State v. Williams,* 657 S.W.2d 405, 412 (Tenn.1983). In *Williams,* our supreme court recognized the following requirements for expert testimony: (1) the witness must be an expert, (2) the subject matter of the witness' testimony must be proper, (3) the subject matter must conform to a generally accepted explanatory theory, and (4) the probative value of the witness' testimony must outweigh its prejudicial effect. *Id.* at 412. In fact, the defendant now claims that Donnelly's testimony met none of these factors.

Unfortunately, the defendant's objections at trial were not so plainly stated. Donnelly testified in detail to substantial training and experience relative to fire and explosion investigations. Without objection, the trial court accepted him as an expert witness in the field of arson investigation. Donnelly testified that he believed that the fire had been started on the driver's side of the car, both front and rear seat areas. He indicated that these areas had suffered the greatest amount of damage and were where the greatest amount of combustibles had been consumed. Donnelly said that gasoline had been applied to the driver's side of the car as an accelerant. He also testified that based on his examination of the car and his viewing of the photographs of the victim's burns, he believed that the gasoline had been poured directly onto the victim. He said that his belief was based upon the fact that damage was limited to the interior of the car, being confined to the driver's side of the car, both front and rear. Likewise, he relied upon the fact that both the front and back of the victim's body was burned, an indication that accelerant was not just splashed onto her while she was in the car.

During the course of this testimony, the defendant's objection primarily related to the fact that Donnelly was not a doctor, in terms of his attempting to interpret how an accelerant was applied to the victim's body. The trial court concluded that Donnelly was entitled to give his opinion based upon his expertise, his review of the autopsy photographs, the lab and investigative reports, and his personal inspection of the materials and car. In this respect, the trial court's ruling was within its discretion and was appropriate. *See State v. Ballard,* 855 S.W.2d 557, 562 (Tenn.1993).

The more specific attacks upon Donnelly's testimony that the defendant now raises under *Williams* cannot be pursued because they were not previously raised. Obviously, if any question had been raised in the trial court about the reliability of the scientific principles involving fire accelerants and paths of burning, full explanation may have been forthcoming from Donnelly or other experts. Without proper objection, we will not fault the trial court or the state for not presenting a greater foundation for the opinions Donnelly gave. Otherwise, we note that expert testimony regarding the nature of accelerants or the paths that fires take is not uncommon. *See, e.g., Otis v. Cambridge Mutual Fire Insurance Company,* 850 S.W.2d 439, 443-444 (Tenn.1992). In this respect, given the record of Donnelly's expertise, the items he reviewed, and the nature of the conclusions he reached, we are unable to hold that his testimony was improperly speculative or otherwise inadmissible.

V.

The defendant claims that the trial court gave incorrect instructions to the jury on the first degree murder elements of premeditation and deliberation. As we noted, our supreme court has held that an instruction to the jury that premeditation may be formed "in an instant" should be abandoned. *Brown,* 836 S.W.2d at 546. The court concluded that such an instruction improperly blurs the distinction between premeditation and deliberation and does not properly allow the jury to consider whether a defendant's actions were done with reflection and a cool purpose. *Id. See also West,* 844 S.W.2d at 147.

In the present case the trial court properly instructed the jury on the separate elements of intent, premeditation, and deliberation. However, the instructions also charged that:

> Premeditation means that the intent to kill must have been formed prior to the act itself. Such intent to kill may be conceived and deliberately formed in an instant. It *711 is not necessary that the purpose to kill preexist in the mind of the accused for any definite period of time. It is sufficient that it preceded the act, however short the interval, as long as it was the result of reflection and judgment.

The instruction contained the language the court in *Brown* held should be abandoned. The defendant

did not object to the instruction at trial in March of 1992 nor did he raise the erroneous instruction as an issue in his initial motion for a new trial. *Brown* was decided in June 1992 and the defendant included the issue in his amended motion for a new trial filed in August 1992. In denying relief on this ground during the motion for a new trial hearing, the trial court noted that *Brown* was not to be applied retroactively and that, in any event, there was sufficient evidence of premeditation and deliberation in this case to render any error harmless. The state on appeal argues these identical grounds and claims that the issue is without merit. We agree.

In *Meadows v. State,* 849 S.W.2d 748, 754 (Tenn.1993), our supreme court reaffirmed its position regarding retroactivity when it stated that "newly announced state constitutional rules will be given retroactive application to cases which are still in the trial or appellate process at the time such rules are announced, unless some compelling reason exists for not so doing." The first step in determining whether a case will be given retroactive application is whether it announces a new constitutional rule. "[A] case announces a new constitutional rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane,* 489 U.S. 288, 301, 109 S.Ct. 1060, 1070, 103 L.Ed.2d 334 (1989).

This court has held on numerous occasions that the *Brown* decision did not create a new constitutional rule. *See, eg., Lofton v. State,* 898 S.W.2d 246 (Tenn.Crim.App.1994), *app. denied,* (Tenn. Feb. 27, 1995); *State v. Jimmy Sills,* No. 03C01-9410-CR-00370, 1995 WL 271726, Hamilton Co. (Tenn.Crim.App. May 10, 1995), *app. denied,* (Tenn. Sept. 11, 1995); *State v. Joe Nathan Person,* No. 02C01-9205-CC-00106, Madison Co., 1993 WL 381218 (Tenn.Crim.App. Sept. 29, 1993); *State v. Willie Bacon, Jr.,* No. 1164, Hamilton Co., 1992 WL 183534 (Tenn.Crim.App. Aug. 4, 1992), *app. denied.* Also, as stated in *Lofton,* the supreme court did not hold in *Brown* that the instruction on premeditation violated a constitutional right. *Lofton,* 898 S.W.2d at 249-250. It only stated that it would be prudent to abandon the instruction because of the potential for confusion. *Id.* We conclude that the trial court did not err in its instructions relative to the elements of premeditated and deliberated first degree murder.

SENTENCING PHASE

I.

The defendant argues that the trial court erred by requiring the defense to disclose a report that had been prepared by his court-appointed investigator, Colin Mitchell, through the testimony of Dr. Meyer. The defendant argues that the report was attorney work product and was privileged. He argues that he was prejudiced by the disclosure because the prosecution was then permitted to cross-examine Dr. Meyer regarding numerous acts committed by the defendant as a child, and then argue these acts to the jury during summation. The state concedes that the report was undiscoverable work product under Rule 16(b)(2), Tenn. R.Crim. P., (FN4) but argues that because the defendant allowed Dr. Meyer to review the report before testifying, the report is discoverable as a basis of his evaluation. They also argue that the specific instances of conduct were properly admitted as an impeachment of Dr. Meyer's evaluation that the defendant exhibited various character traits consistent with both a borderline personality disorder and a post-traumatic stress disorder by showing, ***712** instead, that the defendant also exhibited several character traits of an antisocial personality disorder. We agree.

Rule 703, Tenn. R. Evid., provides that an expert may base his or her opinion on facts or data "perceived by or made known to the expert at or before the hearing." Furthermore, Rule 705, Tenn. R. Evid., provides that the court may require disclosure of the underlying facts or data relied upon by the expert in formulating his opinion. Dr. Meyer testified that he completed his evaluation and report of the defendant in December 1991. On cross-examination, he testified that he relied upon the defendant's statements and the investigator's report to develop facts surrounding the defendant's background. In a jury-out hearing, Dr. Meyer testified that he received the investigator's report about one week prior to trial, used it to verify various aspects of the defendant's childhood and educational background, and considered it before testifying at trial. When cross-examination resumed, Dr. Meyer admitted that he altered his opinion of the defendant's evaluation somewhat after reviewing the investigator's report relative to the defendant's childhood background and behavior. Thus, information in the investigator's report helped form a basis for Dr. Meyer's opinions and it was then subject to disclosure to the state.

Relative to the defendant's claim that he was prejudiced by the cross-examination of Dr. Meyer about several instances of the defendant's setting fire to things as a child, the state argues that the specific instances of conduct were used as a basis to impeach Dr. Meyer's evaluation and to show that the defendant exhibited character traits associated with an antisocial personality disorder. As discussed earlier, Rule 404(b), Tenn. R. Evid., deals with the admission of prior bad acts of the defendant. A jury-out hearing was held in which the trial court ruled that specific instances of conduct could be discussed relative to the reliability of Dr. Meyer's diagnosis. We conclude that the prior bad acts contained in the investigator's report upon which Dr. Meyer, in part, based his evaluation of the defendant were admissible to impeach the doctor's diagnosis and that the danger of their prejudicial effect did not outweigh their probative value.

II.

The defendant contends that the trial court erred with regard to its instructions to the jury on the mitigating circumstances in T.C.A. § 39-13-204(j)(2) and (j)(8). The T.C.A. § 39-13-204(j)(2) circumstance is that the "murder was committed while the defendant was under the influence of extreme mental or emotional disturbance." The T.C.A. § 39-13-204(j)(8) circumstance is that the "capacity of the defendant to appreciate the wrongfulness of [his] conduct or to conform [his] conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but

which substantially affected the defendant's judgment." The defendant contends that the use of "extreme" in the former provision and "substantially" in the latter, deprived the jury of potential mitigation evidence that falls short of these standards.

The defendant's argument was rejected by our supreme court in addressing the identically worded provisions under the previous death penalty statute. *State v. Smith,* 857 S.W.2d 1, 16-17 (Tenn.1993). *See also* T.C.A. § 39-2-203(j)(2)and (j)(8). The defendant in *Smith* argued that "the use of the modifier in (j)(2) and (j)(8), misled the jury in its consideration of evidence of his mental and emotional impairments and intoxication at the time of the offense." The supreme court, however, concluded that there was no likelihood of the jury being misled by these provisions. *Smith,* 857 S.W.2d at 17.

Also, the defendant's contention that the jury is not provided a basis upon which to consider mitigating evidence that falls short of being "extreme" or "substantial" is unavailing. As the state notes, the jury was instructed on T.C.A. § 39-13-204(j)(9), which provides that the jury may consider " *[a]ny* other mitigating factor which is raised by the evidence produced by either the prosecution or defense at either the guilt or sentencing hearings." (Emphasis added). We note as well that a considerable portion of the defense ***713** argument to the jury related to the various aspects of the defendant's mental and emotional states, from his youth to the time of trial. Thus, the qualifiers in the statutory provisions in question did not unconstitutionally limit the jury's consideration of mitigating evidence. *Cazes,* 875 S.W.2d at 268. We conclude that the defendant is not entitled to relief on this issue. (FN5)

III.

As a corollary to the preceding issue, the defendant argues that the trial court erred in refusing to allow certain evidence that the defense claimed was mitigating in nature. We note, of course, that under the Eighth and Fourteenth Amendments to the United States Constitution, a capital sentencer must not be precluded from considering as a mitigating factor any aspect of a defendant's character or record and any circumstances of the offense offered by the defendant as a basis for a sentence less than death. *Skipper v. South Carolina,* 476 U.S. 1, 4, 106 S.Ct. 1669, 1670, 90 L.Ed.2d 1 (1986); *Lockett v. State,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978). In addition, T.C.A. § 39-13-204(c) provides:

> In the sentencing proceeding, evidence may be presented as to any matter that the court deems relevant to the punishment and may include, but not be limited to, the nature and circumstances of the crime; the defendant's character, background history, and physical condition; and evidence tending to establish or rebut the aggravating circumstances enumerated in subsection (i); and any evidence tending to establish or rebut any mitigating factors. *Any such evidence which the court deems to have probative value on the issue of punishment may be received regardless of its admissibility under the rules of evidence;* provided, that the defendant is accorded a fair opportunity to rebut any hearsay statements so admitted....

(emphasis added). The trial court therefore maintains its authority to determine the admissibility of evidence offered in the sentencing phase and to exclude any evidence not relevant to the above factors. *See, e.g., Smith,* 857 S.W.2d at 17; *State v. Johnson,* 632 S.W.2d 542, 548 (Tenn.1982); *see also Lockett,* 438 U.S. at 604, n. 12, 98 S.Ct. at 2964, n. 12.

In determining the effect of an error excluding relevant mitigating evidence, we look to the standard set forth in *Skipper.* There, the United States Supreme Court held that an error in excluding evidence is not harmless if the exclusion of the evidence "may have affected the jury's decision to impose the death sentence." *Id.* at 8, 106 S.Ct. at 1673. In *Skipper,* the trial court had excluded the testimony offered relative to the defendant's good behavior and adjustments since his incarceration for the offense. The Supreme Court concluded that the "exclusion by the state trial court of relevant mitigating evidence impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender." *Id.*

In the present case, the defendant sought to elicit testimony from the defendant's mother relative to the nature of the defendant's relationship with the victim. The witness related that the couple was very happy for the first few years of their relationship but started having problems the past two years. The couple separated and reconciled several times. The trial court sustained an objection as to what the victim told the witness about the relationship in November 1990; however, the defendant made no proffer of evidence in this regard. *See* Tenn. R. Evid. 103. We, therefore, cannot conclude ***714** that the ruling was improper. *See* Tenn. R. Evid. 103(a)(2).

The defendant further elicited from the defendant's mother statements made by the defendant regarding his feelings toward the victim. The prosecution objected because the defense had not specified a time period with regard to the question. The trial court overruled the objection, but limited the defense to questions "within the approximate period of time when the murder took place." The witness was then permitted to testify as to the nature of the relationship from December 1990 to the time of the offense. Again, the defense made no proffer of any additional testimony it sought to admit. The nature of the relationship between the victim and the defendant, insofar as it was a troubled one and had a potential effect on the defendant's mental state, was clearly conveyed to the jury through the testimony of this witness and others. We cannot conclude that the trial court erroneously excluded additional mitigating evidence in this regard. *See, e.g., Smith,* 857 S.W.2d at 17-18.

The defendant also claims that the trial court should have allowed admission of certain photographs as mitigating evidence. The photographs included one of the defendant at thirteen years of age, and several of the victim. The

defendant argued that the jury should consider the photos because they depicted how he looked at his mental age of thirteen, and how, according to the defense, the victim "really did look in reality" and not how the state had "represented her to be." The trial court ruled that the photographs were not relevant to any factors in mitigation and excluded them on that basis.

The testimony of Dr. Meyer established clearly his opinion relative to the defendant's emotional and intellectual levels, as well as his mental age. Introduction of the defendant's photo in this regard would arguably have been cumulative. Thus, exclusion of the defendant's photograph, we conclude, did not affect the jury's decision to impose the death penalty. *See, Skipper,* 476 U.S. at 8, 106 S.Ct. at 1672-73. The defendant's claim with regard to the victim's photographs are also without merit. First, he failed to show how such evidence, purporting to show what the victim "really" looked like, would have been relevant in mitigation. T.C.A. § 39-13-204(c). Second, we cannot, on this record, conclude that the exclusion of such photographs affected the jury's decision to impose the death penalty. Accordingly, the trial court did not abuse its discretion in excluding this evidence. *See Smith,* 857 S.W.2d at 17-18.

Finally, the defendant argues that the jury should have been allowed to consider the medical histories of the victim's past abortions as mitigation evidence. In ruling on this issue, the trial court said:

> There's proof before this jury, the defendant testified about [the victim] having an abortion, that it was weighing on his mind, and that ... he was concerned about the fact that she might be pregnant and have another abortion. That testimony was introduced without objection from the state and it is before this jury. Whether he was or was not suffering under the fact that she had had abortions ... is a question the jury will have to decide.... It's something that the jury can consider as a mitigating factor.

Thus, the trial court allowed evidence that the victim had abortions in the past. The prosecution objected to admitting the entire records of the procedures and the trial court sustained the objection:

> There are some pages that I don't think are relevant, and I don't think it's necessary for the jury to ... know the exact procedure used. The gross description I don't think is necessary to prove at this point what the defense is trying to prove in this case, which is the fact that the defendant knew that she'd had an abortion.

On appeal the defendant has advanced no basis upon which to hold that the trial court's ruling in this regard was an abuse of discretion. The trial court's ruling that the particulars of the abortion procedures were not relevant mitigating factors is supported by the record. *See* T.C.A. § 39-13-204(c) . The evidence in the record, in particular the defendant's testimony in the guilt phase, reveals that the *fact* of the victim's abortions may have affected the defendant's mental ***715** state, but not the particulars of such procedures. Accordingly, the defendant is not entitled to relief on the ground that the trial court unconstitutionally deprived the jury of mitigating circumstances. *See Smith,* 857 S.W.2d at 17-18.

IV.

The defendant's final issue consists of numerous constitutional attacks against the Tennessee Death Penalty statute, T.C.A. § § 39-13-204 and--206, under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution; Article I, Sections 8, 9, 16, and 17 of the Tennessee Constitution; and Article II, Section 2 of the Tennessee Constitution. His contentions, generally, are: (A) that the statute fails to narrow in a meaningful manner the class of death eligible defendants, (B) that the death sentence in Tennessee is imposed arbitrarily and capriciously, (C) that death by electrocution is cruel and unusual punishment, and (D) that the manner of conducting a proportionality review of death sentences in Tennessee is constitutionally inadequate.

(a)

The defendant argues that the death penalty provisions fail to narrow in a meaningful manner the class of death eligible defendants in Tennessee. He asserts three arguments in support of this position. First, he contends that the aggravating circumstance in T.C.A. § 39-13-204(i)(6), that the murder was committed "for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another," duplicates the felony murder aggravating factor in T.C.A. § 39-13-204(i)(7) (1991). His claim is without merit. Although the state attempted to prove factor (6) in this case, and the jury was so instructed, the jury rejected it. Moreover, the jury's finding of factor (7) has been held to be proper for a conviction of premeditated first degree murder. *See Middlebrooks,* 840 S.W.2d at 346.

Second, the defendant contends that the aggravating circumstance in T.C.A. § 39-13-204(i)(5), that the murder was "especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death," is unconstitutionally vague and overbroad. Our supreme court rejected similar contentions, however, in analyzing the former version of this factor, T.C.A. § 39-2-203(i)(5), which read: "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." *See State v. Black,* 815 S.W.2d 166, 181-82 (Tenn.1991); *State v. Barber,* 753 S.W.2d 659, 670 (Tenn.1988); *State v. Williams,* 690 S.W.2d 517, 526-30 (Tenn.1985). Likewise, this court has rejected this contention with respect to its current version. *State v. Richard Odom, a/k/a Otis Smith,* No. 02C01-9305-CR-00080, Shelby Co., slip op. at 35, 1994 WL 568433 (Tenn.Crim.App. Oct. 19, 1994), *app. granted on other grounds* (Tenn. Feb. 6, 1995).

Third, the defendant contends that the aggravating factors in T.C.A. § 39-13-204(i)(2), (i)(5), (i)(6), and (i)(7) fail to narrow the class of death eligible defendants because they combine to encompass the

majority of the homicides in this jurisdiction. There is nothing in the record to support the defendant's argument. Moreover, (i)(2) and (i)(6) do not pertain to this case. Factor (i)(2) was not relied upon by the state and factor (i)(6) was rejected by the jury. Thus the claim with respect to these factors is without merit. *See, e.g., State v. Brimmer,* 876 S.W.2d 75, 87 (Tenn.1994); *State v. Cauthern,* 778 S.W.2d 39, 47 (Tenn.1989).

(b)

The defendant argues that the death penalty in Tennessee is imposed capriciously and arbitrarily. (FN6) He asserts ten arguments in support of this contention. First, he complains that the prosecutors in this state have unlimited discretion as to whether to seek the death penalty in a given case. Second, the defendant argues that the prosecutor's unfettered discretion to subject any defendant *716 charged with first degree murder to a capital sentencing hearing constitutes an improper delegation of judicial power and of legislative power in violation of Article II, Section 2 of the Tennessee Constitution . Third, he argues that such discretion violates state and federal guarantees of equal protection and results in the wanton and freakish imposition of the death penalty that was condemned in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Fourth, the defendant argues that the failure to create a uniform system of jury selection results in unequal treatment for capital defendants that necessarily results in the arbitrary and capricious imposition of the death penalty. Fifth, he argues that the manner of selecting "death qualified" jurors results in juries that are prone to conviction. Sixth, the defendant argues that capital defendants should be allowed to address jurors' popular "misconceptions" regarding parole eligibility, the cost of incarceration versus the cost of execution, general deterrence and the method of execution. Seventh, he argues that it is constitutional error to instruct juries that they must agree unanimously in order to impose a life sentence without telling juries the effect of a nonunanimous verdict. Eighth, he argues that the Tennessee Pattern Jury Instructions create a reasonable likelihood that jurors believe that they must unanimously agree on the existence of any mitigating factors. Ninth, the defendant argues that the Tennessee death penalty statute fails to require that the jury make the ultimate determination of whether death is appropriate in a specific case. And tenth, the defendant submits that it is constitutional error to deny the defendant the right to give final closing argument in the penalty phase of a capital trial based upon his contention that once an aggravating circumstance is proven, the burden of proof shifts to the defendant to present mitigating evidence.

Relative to the defendant's first argument that prosecutors have unlimited discretion as to whether to seek the death penalty in a given case, our supreme court has held that opportunities for discretionary action that inhere in the processing of a murder case, including the authority of the prosecutor to select those persons whom he or she wishes to prosecute for a capital offense, do "not render the death penalty unconstitutional on the theory that the opportunities for discretionary action render imposition of the death penalty freakish or arbitrary." *Brimmer,* 876 S.W.2d at 86 (quoting *Gregg v. Georgia,* 428 U.S. 153, 198-200, 96 S.Ct. 2909, 2937, 49 L.Ed.2d 859 (1976). *See also Cooper v. State,* 847 S.W.2d 521, 536-38 (Tenn.Crim.App.1992)) (rejecting similar claim in post-conviction context). This issue is without merit.

Second, the defendant argues that the discretion accorded the prosecution is an improper delegation of legislative and judicial power in violation of Article II, Section 2 of the Tennessee Constitution. The defendant makes reference to costs and expenditures that result from a prosecutor's decision to seek the death penalty and argues that such appropriations must be made by the legislature. He does not, however, offer support for his contention in the record. The state does not address this issue in its brief.

In *State v. Brackett,* 869 S.W.2d 936 (Tenn.Crim.App.1993), the defendant argued that Tenn. R.Crim. P. 5(a), which allows the prosecution to object to the defendant's waiver of a grand jury investigation and jury trial so as to submit to the jurisdiction of the general sessions court, violated Article II, Sections 1 and 2. This court noted:

> Article II, § 1 of the Tennessee Constitution provides that the powers of government are to be divided into the Legislative, Executive, and Judicial Departments. In general, the "legislative power" is the authority to make, order, and repeal law; the "executive power" is the authority to interpret and apply law; and the "judicial power" is the authority to interpret and apply law. The Tennessee Constitution provision prohibits an encroachment by any of the departments upon the powers, functions and prerogatives of the others.... The branches of government, however, are guided by the doctrine of checks and balances; the doctrine of separation of powers is not absolute....

*717 *Brackett,* 869 S.W.2d at 939 (citations omitted). The court also noted that Article II, Section 2 states, "No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted." *Brackett,* 869 S.W.2d at 940 n. 3. In addressing the defendant's claim, the court noted that the supreme court has the authority to enact rules for our courts, T.C.A. § 16-3-402, and that the rules are approved by resolution of the General Assembly. T.C.A. § 16-3-404. Thus, the court concluded:

> The rule to which the defendant objects in this instance was, of course, initiated by the supreme court as a means of improving the criminal procedure in this state. Because the judiciary promulgated and the Legislature approved the rule granting the prosecution the right to reject a non-jury proceeding in the general sessions court, we find no intrusion by either of the other branches of government.

Brackett, 869 S.W.2d at 939-40.

We conclude that the reasoning of *Brackett* applies here as well. The district attorney general is given

statutory authority to prosecute criminal cases in his or her jurisdiction. T.C.A. § 8-7-103(1). When the death penalty will be sought in a first degree murder case, the prosecutor must afford notice to the defendant of the intent to seek the death penalty, as well as notice regarding the aggravating factors that will be relied upon. Tenn. R.Crim. P. 12.3(b). Thereafter, the proceedings are governed by the provisions passed by the Legislature in T.C.A. § 39-13-204. The defendant in this case has not shown, nor has he cited authority to show, that this functioning violates the separation of powers doctrine under Tennessee law. This issue is without merit.

Third, the defendant argues that the death penalty statute has been imposed discriminatorily on the basis of economics, race, gender and geographic region in the state. This argument has been rejected by the supreme court. *See Brimmer,* 876 S.W.2d at 87 n. 5; *Cazes,* 875 S.W.2d at 268; *Smith,* 857 S.W.2d at 23; *State v. Evans,* 838 S.W.2d 185, 196 (Tenn.1992). Moreover, the record is devoid of evidence indicative of an individualized showing of improper discrimination with regard to the sentencing of the defendant in this case. *See, e.g., McCleskey v. Kemp,* 481 U.S. 279, 292-93, 107 S.Ct. 1756, 1767, 95 L.Ed.2d 262 (1987); *Cooper,* 847 S.W.2d at 531.

Fourth, the defendant submits that the failure to create a uniform system of jury selection results in unequal treatment for capital defendants and necessarily results in arbitrary and capricious imposition of the death penalty. Specifically, the defendant contends that all capital defendants should be guaranteed individual sequestered voir dire and a questioning process which would maximize the prospective jurors' candor.

Our supreme court has rejected the argument that the lack of uniform procedures mandating individual sequestered voir dire during jury selection renders the imposition of the death penalty arbitrary and capricious. In *Cazes,* 875 S.W.2d at 269, the court concluded, without discussion, that this argument had been previously rejected in *Caughron,* 855 S.W.2d at 542. Further, the court has said that the "ultimate goal of voir dire is to insure that jurors are competent, unbiased and impartial, and the decision of how to conduct voir dire of prospective jurors rests within the sound discretion of the trial court." *Cazes,* 875 S.W.2d at 269. *See also Black,* 815 S.W.2d at 180. In this case, the defendant has not challenged any of the jurors selected or the manner in which the trial court conducted voir dire. This issue is without merit.

Fifth, the defendant argues that the manner of selecting "death qualified" jurors results in juries that are prone to conviction. In *State v. Teel,* 793 S.W.2d 236, 246 (Tenn.1990), *cert. denied,* 498 U.S. 1007, 111 S.Ct. 571, 112 L.Ed.2d 577 (1990), however, our supreme court stated that "[t]his argument has been rejected by both the Tennessee and United States Supreme Court." *See also State v. Harbison,* 704 S.W.2d 314, 318 (Tenn.1986). The defendant has not offered any evidence in which to substantiate his claim, nor has he presented a principled basis with which to distinguish the supreme court holdings in this area.

***718** Sixth, the defendant contends that capital defendants should be allowed to address jurors' popular "misconceptions" concerning parole eligibility, the cost of incarceration versus the cost of execution, general deterrence, and the method of execution in order to avoid arbitrary decision making. This argument, however, has been rejected on several occasions by our supreme court. *See Black,* 815 S.W.2d at 179; *See also Brimmer,* 876 S.W.2d at 86-87; *Cazes,* 875 S.W.2d at 268. Moreover, the defendant did not present any evidence with respect to his contentions.

As his seventh argument, the defendant submits that it is constitutional error to instruct juries that they must agree unanimously in order to impose a life sentence and to prohibit juries from being told the effect of a nonunanimous verdict. *See* T.C.A. § 39-13-204(h). However, this contention also has been repeatedly rejected by the supreme court. *See Brimmer,* 876 S.W.2d at 87; *Cazes,* 875 S.W.2d at 268; *Smith,* 857 S.W.2d at 22-23; *Barber,* 753 S.W.2d at 670-71.

Relative to this issue, the defendant contends that requiring the jury to agree unanimously to a life verdict violates the holding in *McKoy v. North Carolina,* 494 U.S. 433, 110 S.Ct. 1227, 108 L.Ed.2d 369 (1990), and in *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). The claim has been held to be without merit under Tennessee law. *See Brimmer,* 876 S.W.2d at 87; *Thompson,* 768 S.W.2d at 250; *State v. King,* 718 S.W.2d 241, 249 (Tenn.1986). In *Brimmer,* the court noted that *McKoy* and *Mills* stand for the principle that any requirement that the jury must unanimously find a mitigating circumstance before it can be considered violates the Eighth Amendment. The court went on to state that the unanimous *verdict* instruction does not violate these principles. *Brimmer,* 876 S.W.2d at 87. *See also Teel,* 793 S.W.2d at 252. In any event, the trial court in the present case instructed the jury that there was no requirement for jury unanimity or agreement as to any particular mitigator. Also, it followed with instructions for each juror to decide the case individually and for each to know that they were *not* required to reach a unanimous verdict regarding mitigators or their weight. Thus, the concerns expressed in *McKoy* and *Mills* are not present in this case.

Eighth, the defendant argues that the Tennessee Pattern Jury Instructions create a reasonable likelihood that jurors are led to believe they must unanimously agree on the existence of any mitigating factors. The supreme court has repeatedly rejected this argument. *See Brimmer,* 876 S.W.2d at 87; *Cazes,* 875 S.W.2d at 268. Moreover, the trial court instructed the jury that "[t]here is no requirement of jury unanimity as to any particular mitigating circumstance, or that you agree on the same mitigating circumstance." It is a well-established rule in Tennessee that a jury is presumed to have followed the instructions of the trial court. *State v. Lawson,* 695 S.W.2d 202, 204 (Tenn.Crim.App.1985).

Ninth, the defendant claims that the statute fails to require that the jury make the ultimate determination of whether death is the appropriate penalty in a

specific case. This argument has likewise been rejected by the supreme court. *See Brimmer,* 876 S.W.2d at 87; *Smith,* 857 S.W.2d at 22. The defendant's claim that there is no weighing process for aggravating and mitigating factors is also without merit. In *State v. Bane,* 853 S.W.2d 483, 488 (Tenn.1993), the supreme court said that "a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is not constitutionally required."

As his tenth and final argument in support of his contention that the death penalty is imposed arbitrarily and capriciously in Tennessee, the defendant contends that once an aggravating circumstance is proven, the burden of proof shifts to the defendant to present mitigating evidence. Therefore, the defendant argues, it is constitutional error to deny the defense the right to give the final closing argument in the penalty phase. This issue has been rejected by the supreme court on numerous occasions. *See Brimmer,* 876 S.W.2d at 87 n. 5; *Cazes,* 875 S.W.2d at 269; *Smith,* 857 S.W.2d at 24; *Caughron,* 855 S.W.2d at 542. In *Smith,* the court said that the "order [of argument] is not inherently ***719** prejudicial to the defendant or favorable to the state in its use at the sentencing stage of a death penalty proceeding." *Smith,* 857 S.W.2d at 24.

(c)

In another challenge to the death penalty statute, the defendant argues that electrocution is cruel and unusual punishment, therefore, violating the Eighth Amendment of the United States Constitution and Article I, Section 16 of the Tennessee Constitution. Our supreme court rejected this argument in *Black,* 815 S.W.2d at 179, and has since reaffirmed its holding on several occasions. *See State v. Nichols,* 877 S.W.2d 722, 737 (Tenn.1994); *Cazes,* 875 S.W.2d at 268; *Howell,* 868 S.W.2d at 258; *Smith,* 857 S.W.2d at 23; *Bane,* 853 S.W.2d at 489.

(d)

The defendant argues that the appellate review process in death penalty cases is constitutionally inadequate in its application. He contends that the appellate review process is not constitutionally meaningful because the appellate courts cannot reweigh proof due to the absence of written findings concerning mitigating circumstances, because the information relied upon by the appellate courts for comparative review is inadequate and incomplete and because the appellate courts' methodology of review is flawed. This argument has been specifically rejected by our supreme court on numerous occasions. *Cazes,* 875 S.W.2d at 270-71; *see also State v. Harris,* 839 S.W.2d 54, 77 (Tenn.1992); *Barber,* 753 S.W.2d at 664.

Moreover, the defendant contends that the statutorily mandated proportionality review is conducted in violation of due process and the law of the land. He argues that there is no comprehensive procedure for gathering information in capital cases and no published set of criteria for the review. In support of his claim, the defendant argues that since the promulgation of the current statute in 1977, the supreme court has found no death sentence to be imposed in a disproportionate manner. (FN7)

As previously noted, the appellate review provided for in the statute has been held to afford a meaningful proportionality review. *Brimmer,* 876 S.W.2d at 87-88; *Cazes,* 875 S.W.2d at 270-71. Moreover, our supreme court has relied upon and upheld the use of trial court reports in capital cases pursuant to Rule 12, Tennessee Supreme Court Rules. In *Harris,* 839 S.W.2d at 77, the court noted that it has considered the information in such reports and that, because no two cases or defendants are exactly alike, each review for proportionality must be based on the individual defendant and the nature of the crime. *See also Cazes,* 875 S.W.2d at 270-71 (Rule 12 report not prepared; supreme court's review for proportionality based on its thorough review of the record and Rule 12 reports in other cases). Accordingly, the defendant is not entitled to relief on this basis.

CONCLUSION

In consideration of the foregoing and the record as a whole, the defendant's conviction for first degree murder and sentence of death are affirmed.

/s/ Joseph M. Tipton
Joseph M. Tipton, Judge

CONCUR:

/s/ Gary R. Wade
Gary R. Wade, Judge

/s/ John H. Peay
John H. Peay, Judge

REID, Justice, concurring.

I concur in affirming the verdict of guilty of premeditated murder and the sentence of death.

Four issues are before the Court--jury instructions regarding nonstatutory mitigating circumstances, the admissibility of expert testimony, the validity of arson as an aggravating circumstance, and the comparative proportionality review. (FN1)

***720.** Any error with regard to mitigating circumstances was not prejudicial.

As discussed in the lead opinion, the testimony of Dr. Roger Meyer as an expert witness was not excluded by the court. When the court advised counsel that any evidence "going towards state of mind that would create a defense or an excuse for this killing" would be allowed, counsel, without explanation, did not call Dr. Meyer as a witness. The error, if any, was not a legal error committed by the court.

I also agree that arson is a valid aggravating circumstance in this case, in which the defendant was convicted of premeditated murder. I would argue that the principle on which *Middlebrooks* is based would preclude the establishment of more than one aggravating circumstance with the same evidence, (FN2) but that is not the situation in this case. Here, the facts that established arson of the vehicle were relevant and admissible evidence

concerning the offense, not proof of another aggravating circumstance or an element of premeditated murder.

Although I think the procedure for conducting comparative proportionality review set forth in *State v. Bland* can be further developed, *State v. Bland*, 958 S.W.2d 651 (Tenn. 1997) (Reid, J., dissenting), application of that procedure to the circumstances of the crime and the character of the defendant does not show the sentence of death to be disproportionate. Some of the cases in which the sentence of death was affirmed relied upon in the lead opinion are similar to this case. The absence of similar cases in which the defendant was sentenced to life imprisonment may be explained by the egregious means whereby the murder was accomplished in this case.

Consequently, I concur.

(FN1.) Although not raised as an issue in this appeal, the trial judge imposed a twenty-five year sentence on the conviction for aggravated arson, consecutive to the death penalty.

(FN2.) "Whenever the death penalty is imposed for first degree murder and when the judgment has become final in the trial court, the defendant shall have the right of direct appeal from the trial court to the Court of Criminal Appeals. The affirmance of the conviction and the sentence of death shall be automatically reviewed by the Tennessee Supreme Court. Upon the affirmance by the Court of Criminal Appeals, the clerk shall docket the case in the Supreme Court and the case shall proceed in accordance with the Tennessee Rules of Appellate Procedure."

(FN3.) Tennessee Supreme Court Rule 12 provides in pertinent part as follows: "Prior to the setting of oral argument, the Court shall review the record and briefs and consider *all* errors assigned. The Court may enter an order designating those issues it wishes addressed at oral argument."

(FN4.) In addition to the fire on April 6, 1991, the victim's car was burned on April 1, 1991. The defendant was indicted for arson related to these fires, but the trial court severed these counts, and they were later dismissed.

(FN5.) The defendant went to trial on three charges: (1) first degree murder by an unlawful, intentional, premeditated and deliberate killing, (2) first degree murder by a reckless killing committed during the perpetration of arson (felony murder), and (3) aggravated arson. He entered guilty pleas before the jury to arson and felony murder. After the trial court refused to accept the guilty pleas, the defendant persisted in admitting guilt to those crimes before the jury, contesting only the charge that the killing was premeditated and deliberated. At the conclusion of the proof, the trial court instructed the jury that it could return a guilty verdict for either felony murder or premeditated murder, but not for both. Acting in accordance with the instructions, the jury found the defendant guilty of aggravated assault and premeditated first degree murder. The jury did not report a verdict on the charge of felony murder.

(FN6.) *See* Footnote 4, *supra*.

(FN7.) This evidence was admitted during the sentencing phase as part of the prosecution's attempt to establish the aggravating circumstance in Tenn.Code Ann. § 39-13-204(i)(6), which provides that "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." The jury, however, rejected this factor.

(FN8.) At the time this offense was committed, Tenn.Code Ann. § 39-13-202(a)(1) (1991) provided that the "intentional, premeditated and deliberate killing of another" constitutes first degree murder. The definition was amended in 1995 and first degree murder is now defined as "the intentional and premeditated killing of another." Tenn.Code Ann. § 39-13-202(a)(1) (1991 & Supp.1996).

*720 (FN9.) Our holding closely resembles the American Law Institute's Model Penal Code which does not mention the term "diminished capacity," but nevertheless provides that "[e]vidence that the defendant suffered from a mental disease or defect shall be admissible whenever it is relevant to prove that the defendant did or did not have the state of mind which is an element of the offense." A.L.I. Model Penal Code § 4.02(1) (Official Draft 1962). The Comment to that Section explains: "[i]f states of mind such as deliberation or premeditation are accorded legal significance, psychiatric evidence should be admissible when relevant to prove or disprove their existence to the same extent as any other relevant evidence."

(FN10.) It is not clear from the record why defense counsel chose not to make a testimonial offer of proof. Whenever counsel sought to do so during this trial, the trial court appropriately granted the request. We have repeatedly stressed the importance of an offer of proof. Not only does it ensure effective and meaningful appellate review, it provides the trial court with the necessary information before an evidentiary ruling is made. Indeed, generally, if an offer of proof is not made, the issue is deemed waived and appellate review is precluded. *State v. Coker*, 746 S.W.2d 167, 171 (Tenn.1987); *State v. Goad*, 707 S.W.2d 846, 853 (Tenn.1986). However, in this case, we can review the issue based upon the substance of Dr. Meyer's testimony at the sentencing hearing.

(FN11.) The trial court in this case did not have the benefit of *Shelton, Phipps*, or *Abrams*, when this ruling was made.

(FN12.) Though not pertinent to admissibility, we note that Dr. Meyer's testimony was greatly weakened by his admission that his conclusions were partially based upon inaccurate and incomplete information, and his refusal, despite that fact, to revise his conclusions.

(FN13.) *See e.g. Provence v. State*, 337 So.2d 783 (Fla.1976).

(FN14.) "Where the intent with which, the mode in, or the means by which, an act is done, are essential to the commission of the offense, and

such offense may be committed with different intents, in different modes, or by different means, if the jury is satisfied that the act was committed with one (1) of the intents, in one (1) of the modes, or by either of the means charged, it shall convict, although uncertain as to which of the intents charged existed, or which mode, or by which of the means charged, such act was committed."

(FN15.) Because of our conclusion that the error was harmless in this case, we do not address the separation of powers question which arises from the State's assertion that Public Chapter 139 divests reviewing courts of authority to grant relief in a case regardless of a conclusion that prejudicial error has resulted from the failure to give instructions on nonstatutory mitigating circumstances. In reserving this issue for another day, we are mindful of our duty to resolve constitutional conflicts only when absolutely necessary for a determination of the case and the rights of the parties. *Owens v. State,* 908 S.W.2d 923 (Tenn.1995).

(FN16.) The trial judge granted Special Request No. 4, Decision To Be Made By Individual Jurors; Special Request No. 12, Presumption Regarding Aggravating Circumstances; Special Request No. 57, Mitigation-Definition, Weight, Unanimity; Special Request No. 58, Mitigation-Definition; Special Request No. 59, Mitigation-Definition.

(FN17.) "The youth or advanced age of the defendant at the time of the crime."

(FN18.) "The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance."

(FN19.) "The capacity of the defendant to appreciate the wrongfulness of the defendant's conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication which was insufficient to establish a defense to the crime but which substantially affected the defendant's judgment."

(FN20.) Defense counsel argued the following factors should be considered as mitigation. Hall expressed remorse; Hall was young when the offense was committed; Hall had a mental or emotional disturbance because of the failed relationship with the victim; Hall had a mental disease or defect; Hall was intoxicated; Hall was unusually immature for his age; Hall lacked normal emotional development; Hall is a follower and not a leader; Hall, at an early age, exhibited signs of mental or emotional disturbance that went untreated; At the time of the murder Hall's mental or emotional development was significantly below that of persons of his chronological age; Hall is an insecure man with low intelligence; Hall has low self-esteem and self-worth; Hall's basic personality inadequacy created stress and erosion of his self-confidence; Hall has a history of alcohol, drug and/or narcotic abuse and addiction; Hall expressed sorrow for the murder and was willing to plead guilty; Hall's capacity to appreciate the wrongfulness of his conduct was impaired.

*720_ (FN21.) At least 44 of the persons sentenced to death in Tennessee since 1977 were between the ages of 19 and 25 when they committed the murder and at least ten were 18 or 19 when the offense was committed.

(FN1.) The defendant went to trial on three charges: (1) first degree murder by an unlawful, intentional, premeditated and deliberate killing, (2) first degree murder by a reckless killing committed during the perpetration of arson (felony murder), and (3) aggravated arson. However, he entered guilty pleas before the jury to arson and felony murder. After the trial court refused to "accept" the guilty pleas, the defendant persisted in such pleas before the jury, contesting only the charges that the killing was premeditated and deliberate. At the conclusion of the proof, the trial court instructed the jury that it could return a guilty verdict for either felony murder or for a premeditated and deliberated murder, but not for both. Under this instruction, the jury reported that the defendant was found guilty of aggravated arson and premeditated and deliberate murder. No finding regarding a felony murder was reported.

(FN2.) Although not relevant to our inquiry, we note that the definition of first degree murder contained in T.C.A. § 39-13-202 was amended in 1995. *See* T.C.A. § 39-13-202 (Supp.1996).

(FN3.) The defendant relies upon *State v. McCall,* 698 S.W.2d 643 (Tenn.Crim.App.1985), in which the victim had been shot in the chest and later run over and dragged by a car. This court held that it was error to admit photographs of the victim because, with the exception of the gunshot wound, all of the harm to the victim was caused by the subsequent passing of a vehicle. Conversely, in the present case, the photograph that was admitted, although altered, was limited in nature and depicted injuries the victim received as a result of the defendant's conduct. Thus, we do not consider *McCall* to be dispositive of this issue.

(FN4.) In *State v. Nichols,* 877 S.W.2d 722, 730 (Tenn.1994), the supreme court concluded that "when a psychologist or psychiatrist does not prepare a summary report, but instead relies on extensive memoranda to record not only observations and hypotheses but also evaluations, such records are discoverable under Rule 16(b)(1)(B)." In this case, Dr. Meyer prepared an evaluation report in advance of trial and therefore, the investigator's report is considered an internal memorandum and is generally nondiscoverable, as the state concedes, under Tenn. R.Crim. P. Rule 16(b)(2).

(FN5.) We note that the defendant also relies on *Smith v. McCormick,* 914 F.2d 1153, 1163-65 (9th Cir.1990), which we conclude is distinguishable. The Ninth Circuit reversed the denial of habeas corpus relief in part because Montana's death penalty structure interfered with the consideration of mitigating evidence. The defendant is correct that Montana statutes contained similar mitigation factors modified by "extreme" and "substantial." However, Montana statutes also provided that the death penalty was required if the sentencer found

one or more aggravating circumstance and no mitigating circumstances "sufficiently substantial" to call for leniency. *Id.* at 1163. Tennessee provisions do not contain such a limitation. *See* T.C.A. § 39-13-204(f) and (g).

(FN6.) In support of his contentions, the defendant cites to numerous studies, newspaper articles, law review articles, and journals. There is no evidence in the record, however, with respect to any of his contentions. *See, e.g., Smith,* 857 S.W.2d at 23.

(FN7.) We note, however, that in *State v. Branam,* 855 S.W.2d 563 (Tenn.1993), the supreme court found the death penalty to be disproportionate and reduced the defendant's sentence to life. *Id.* at 570-71.

(FN1.) No issue is made regarding the sufficiency of the evidence to support the aggravating circumstances or the finding that the aggravating circumstances outweigh the mitigating circumstances. Tenn Code Ann. § 39-13-204(g)(1) (Supp. 1996).

***720** (FN2.) *State v. Middlebrooks,* 840 S.W.2d 317, 352 (Tenn. 1992) ("the constitutional deficiency is that the aggravating circumstance does not narrow the class, not that it duplicates the elements of the offense.").

*147 46 S.W.3d 147

Supreme Court of Tennessee,
at Nashville.

John David **TERRY**
v.
STATE of Tennessee.
April 25, 2001.
Rehearing Denied May 18, 2001.

Defendant was convicted in a jury trial in the Criminal Court, Davidson County, Randall Wyatt, J., of premeditated first-degree murder and arson, and was sentenced to death. Defendant appealed. The Court of Criminal Appeals affirmed. Defendant appealed. The Supreme Court, Barker, J., held that: (1) prosecutor's closing argument did not improperly present jury with non-statutory aggravating circumstances to be weighed against mitigating circumstances; (2) evidence supported death penalty aggravating circumstances of murder that was especially heinous, atrocious, or cruel; (3) evidence supported aggravating circumstance of murder to prevent arrest; and (4) death penalty was not disproportionate.

Affirmed.

Birch, J., dissented and filed opinion.

West Headnotes

[1] Sentencing and Punishment ⚿1789(9)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(9) Harmless and Reversible Error.
Any irregularity in trial court's instructions regarding the weighing standard under language of amended capital sentencing statute was harmless, where instructions required jury to impose death penalty on a higher standard of proof. T.C.A. § 39-13-204.

[2] Criminal Law ⚿713
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k712 Statements as to Facts, Comments, and Arguments
110k713 In General.

[See headnote text below]

[2] Criminal Law ⚿730(1)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k730 Action of Court
110k730(1) In General.

[See headnote text below]

[2] Criminal Law ⚿1154
110 ----
110XXIV Review
110XXIV(N) Discretion of Lower Court
110k1154 Arguments and Conduct of Counsel.
Attorneys are given greater leeway in arguing their positions before jury, and trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of abuse of discretion.

[3] Sentencing and Punishment ⚿1756
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1756 In General.
In a capital sentencing hearing, evidence may be presented tending to establish or rebut any statutory aggravating circumstances or mitigating circumstances.

[4] Sentencing and Punishment ⚿1759
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1759 Nature and Circumstances of Offense.
In a capital sentencing hearing, jury must be permitted to consider evidence pertaining to nature and circumstances of crime even if proof is not necessarily related to a statutory aggravating circumstance.

[5] Sentencing and Punishment ⚿1656
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1656 Factors Extrinsic to Statute or Guideline in General.
State may not rely upon non-statutory aggravating circumstances in seeking imposition of death penalty.

[6] Sentencing and Punishment ⚿1645
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1645 In General.
In determining whether death is appropriate punishment for offense and for individual defendant, jury is free to consider "a myriad of factors" relevant to punishment, that is, relevant to establishing and assigning weight to aggravating and mitigating circumstances. T.C.A. § 39-13-204(g)(1)

[7] Sentencing and Punishment ⚿1780(2)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) Arguments and Conduct of Counsel.
Prosecutor's penalty-phase closing argument in which prosecutor listed six factors, such as "brutality of murder" and "concealment of crime," on one side of handwritten chart and mitigating factors next to those factors did not improperly present jury with non-statutory aggravating circumstances to be weighed against mitigating

circumstances; rather, prosecutor properly asked jury to consider certain facts and circumstances of offense establishing and giving weight to existence of two death penalty aggravating circumstances that murder was heinous, atrocious, or cruel, and that murder was committed for purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of defendant.

[8] Sentencing and Punishment ⚭1652
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1652 Aggravating Circumstances in General.
Role of death penalty aggravating circumstance is to circumscribe the class of persons eligible for death penalty.

[9] Sentencing and Punishment ⚭1625
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 Aggravating or Mitigating Circumstances.
Statutory death penalty aggravating circumstance is constitutional if it meets two requirements: (1) circumstance may not apply to every defendant convicted of a murder, but must apply only to a subclass of defendants convicted of murder; and (2) circumstance may not be unconstitutionally vague.

[10] Sentencing and Punishment ⚭1625
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 Aggravating or Mitigating Circumstances.
Pre-1989 death penalty aggravating circumstance that murder was especially heinous, atrocious, or cruel was not vague or overbroad. T.C.A. § 39-2-203(i)(5) (Repealed).

[11] Courts ⚭97(1)
106 ----
106II Establishment, Organization, and Procedure
106II(G) Rules of Decision
106k88 Previous Decisions as Controlling or as Precedents
106k97 Decisions of United States Courts as Authority in State Courts
106k97(1) In General.
Supreme Court is not bound by federal court decisions other than those of United States Supreme Court.

[12] Sentencing and Punishment ⚭1789(5)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(5) Scope of Review.
When sufficiency of evidence supporting a death penalty aggravating circumstance is challenged, appellate court must determine whether, after viewing evidence in light most favorable to state, a rational trier of fact could have found existence of aggravating circumstance beyond a reasonable doubt.

[13] Sentencing and Punishment ⚭1772
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 Sufficiency.
Evidence supported application of pre-1989 death penalty aggravating circumstance that murder was especially heinous, atrocious, or cruel, in case involving defendant's elaborate murder/arson scheme in which he attempted to simulate his own death and then disappear under an assumed identity; defendant's plan involved murdering an individual similar in size to himself and dismembering corpse to remove identifiable body parts so as to make body appear to be his own, defendant selected victim, who was approximately same size and often wore defendant's clothes, defendant worked for months to foster a close relationship with victim, defendant used his position *147 as pastor to counsel victim, employ him, find and pay for housing for victim, and eventually earn his trust and friendship, at same time, defendant was hiding weapons at scene of crime in preparation for murder, and on pretense of taking victim on fishing trip, defendant shot and killed victim at his own church, and dismembered corpse as soon as 15 minutes to one hour after victim's death. T.C.A. § 39-2-203(i)(5) (Repealed).

[14] Sentencing and Punishment ⚭1772
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1772 Sufficiency.
Evidence was sufficient to support finding that defendant committed murder, at least in part, to prevent his apprehension for embezzlement of church funds, so as to warrant application of pre-1989 death penalty aggravating circumstance that murder was committed to prevent arrest, in case involving defendant's elaborate murder/arson scheme in which he attempted to simulate his own death and then disappear under an assumed identity; defendant painstakingly planned his escape to leave behind his old self and start his life anew, under a new identity and with a new appearance such that he could remain "dead" forever, for several months, defendant purchased legal documents under a new name, purchased additional life insurance for provision of his family, and carefully planned murder itself to make it look like he died at hands of victim, and once murder was committed, defendant altered his appearance so as to avoid detection and possible apprehension. T.C.A. § 39-2-203(i)(6) (Repealed).

[15] Sentencing and Punishment ⚭1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Purpose of comparative proportionality review is to ensure that death penalty is applied consistently

and not arbitrarily or capriciously. T.C.A. § 39-13-206(c)(1)(D).

[16] Sentencing and Punishment ⚿1788(7)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(7) Presumptions.
Presumption is that a sentence of death is proportional to crime of first-degree murder, as long as sentencing procedures focus discretion on particularized nature of crime and particularized characteristics of individual defendant. T.C.A. § 39-13-206(c)(1)(D).

[17] Sentencing and Punishment ⚿1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Applying precedent-seeking approach for comparative proportionality review of death sentence, Supreme Court undertakes to compare current case to other cases in which defendants were convicted of same or similar crimes, and looks at facts and circumstances of crime, characteristics of defendant, and aggravating and mitigating factors involved. T.C.A. § 39-13-206(c)(1)(D).

[18] Sentencing and Punishment ⚿1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Because no two cases involve identical circumstances, Supreme Court's objective in conducting comparative proportionality review of death sentence cannot be to limit comparison to those cases where a defendant's death sentence is perfectly symmetrical, but only to identify and to invalidate the aberrant death sentence. T.C.A. § 39-13-206(c)(1)(D).

[19] Sentencing and Punishment ⚿1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Nonexclusive factors relevant to process of identifying and comparing similar cases in comparative proportionality review of death sentence include: (1) means of death; (2) manner of death (e.g., violent or torturous); (3) motivation for killing; (4) place of death; (5) similarity of victim's circumstances including age, race, and physical and mental conditions; and victim's treatment during killing; (6) absence or presence of premeditation; (7) absence or presence of provocation; (8) absence or presence of justification; and (9) injury to and effects on nondecedent victims. T.C.A. § 39-13-206(c)(1)(D).

[20] Sentencing and Punishment ⚿1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Nonexclusive factors relevant to comparison of characteristics of defendants in comparative proportionality review of death sentence include: (1) defendant's prior criminal record or prior criminal activity; (2) defendant's age, race, and gender; (3) defendant's mental, emotional, or physical condition; (4) defendant's involvement or role in murder; (5) defendant's cooperation with authorities; (6) defendant's remorse; (7) defendant's knowledge of helplessness of victim(s); and (8) defendant's capacity for rehabilitation. T.C.A. § 39-13-206(c)(1)(D).

[21] Homicide ⚿354(1)
203 ----
203XI Sentence and Punishment
203k354 Nature and Extent of Punishment
203k354(1) In General.
Death sentence for premeditated murder of victim in connection with elaborate murder/arson scheme in which defendant attempted to simulate his own death and then disappear under an assumed identity, in part to avoid apprehension for embezzlement of church funds, was neither disproportionate to penalty imposed in similar cases, nor arbitrarily applied. T.C.A. § 39-13-206(c)(1)(D).

[22] Sentencing and Punishment ⚿1657
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1657 Proportionality in General.
Although death penalty may be imposed for offense involving circumstances similar to those of an offense in which only a sentence of life imprisonment is imposed, death sentence is not disproportionate if Supreme Court can ascertain some basis for imposition of the lesser sentence. T.C.A. § 39-13-206(c)(1)(D).

***150** Brock Mehler and Michael E. Terry, Nashville, TN, for the appellant, John David Terry.

Michael E. Moore, Solicitor General; Tonya G. Miner, Assistant Attorney General, Nashville, TN, for the appellee, State of Tennessee.

OPINION

BARKER, J., delivered the opinion of the court, in which ANDERSON, C.J., and DROWOTA, and HOLDER, JJ., joined.

The defendant was first convicted of premeditated first degree murder and arson in 1989. The jury found two statutory aggravating circumstances: (1) that the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind; and (2) that the murder was committed while the defendant was engaged in committing a larceny. Finding that the aggravating circumstances outweighed the mitigating circumstances, the jury sentenced the defendant to death by electrocution. This Court granted a new sentencing hearing after

determining that the trial court had erroneously charged the jury that the murder was committed while the defendant was committing a larceny. In 1997, a jury again sentenced the defendant to death, finding that (1) the murder was especially heinous, atrocious, or cruel in that it involved depravity of mind, and (2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant. The Court of Criminal Appeals affirmed. On automatic appeal, we affirm and hold that: (1) no prosecutorial misconduct occurred when the prosecutor asked the jury to consider certain facts and circumstances when weighing statutory aggravating circumstances against mitigating evidence; (2) the trial court did not err in allowing the jury to consider relevant facts and circumstances tending to establish aggravating circumstances or to rebut mitigating circumstances; (3) the evidence is sufficient to support a finding that the murder was especially heinous, atrocious, or cruel in that it involved depravity of mind; (4) the evidence is sufficient to support a finding that the defendant committed murder to avoid lawful arrest or prosecution; and (5) the sentence of death is not disproportionate to the sentence imposed in similar cases. For all other issues not specifically discussed in this opinion, we agree with and affirm the Court of Criminal Appeals.

BACKGROUND

On June 15, 1987, the defendant, John David Terry, shot and killed church handyman James Matheney and was sentenced to death in 1989. This Court remanded the case for resentencing after determining that the trial court erred in charging the jury the aggravating circumstance that the murder was committed while the defendant was engaged in committing a larceny. (FN1) The resentencing hearing was conducted ***151** in August 1997, and the jury again returned a verdict of death based upon its finding of two aggravating circumstances. The case is now before us on appeal from that judgment.

The events giving rise to the murder occurred predominantly in March of 1987. At that time, the defendant was the Associate Bishop Overseer of the Emmanuel Churches of Christ, a centrally organized governing body of local churches. He was also the pastor of one of those local churches--the Woodland Street Church--in Nashville. For several years, the defendant believed that the current Bishop Overseer would retire at the age of 65, and that he would be appointed the next Bishop. In March 1987, however, his expectations were disappointed when the Bishop announced that he was not going to resign. The defendant testified that soon thereafter, he became overwhelmed by the sense that he had failed in life, and he began to contemplate suicide. However, he ultimately pursued a plan to stage his death and assume a new identity.

In furtherance of his plan, the defendant, who had been misappropriating church funds since 1984, began to withdraw large sums of money from the church account. He withdrew five thousand dollars to purchase a motorcycle and another ten thousand dollars to keep in cash. In April, the defendant ordered several books advertised in *Soldier of Fortune* magazine to learn how to change his identity. Based on the information he read in these books, he randomly searched the obituaries at the local library until he found the obituary of seven-year-old drowning victim, Jerry Milam, whose birth date was similar to that of the defendant. He obtained a copy of Jerry Milam's birth certificate and forged a copy of a baptismal certificate. Using these documents, the defendant was able to get a driver's license, a social security number, a fictitious mailing address, and the title to the purchased motorcycle--all in the name of Jerry Milam.

The defendant also made concerted efforts to befriend the victim, James Matheney, whose ex-wife, Teresa Seagraves, was a parishioner at the defendant's church. The defendant testified that he had wanted to incorporate Mr. Matheney into his plan to disappear by staging "some kind of a hoax or some kind of robbery and have ... [Mr. Matheney] be the one that would come in and ... find blood or find some kind of robbery attempt." (FN2) Accordingly, he spent time fostering a relationship with Mr. Matheney by counseling him through some personal problems, hiring the unemployed Mr. Matheney as the church's second handyman, and renting an apartment for him, paying the first six weeks' rent.

On the day of the murder, the defendant and Mr. Matheney prepared to set out on a fishing trip lasting for several days. That morning, the defendant picked up Mr. Matheney at his apartment and drove ***152** to the church. He testified that he gave Mr. Matheney the keys to his car and his credit card to buy gasoline for his car while he returned phone calls made to the church.

The defendant stated that approximately thirty minutes later, he heard someone come into the church. When he went to investigate, he noticed that the fold-down stairwell leading up to the church attic had been lowered. He climbed the stairs, saw James Matheney, and shot him in the "side of the back of the head" with a .38 caliber pistol. (FN3)

He later cut off the victim's head and right forearm. (FN4) After undressing the victim down to his underwear and putting his own belt around the victim's waist, he placed the clothes in one sack and the body parts in another sack. Leaving the body up in the attic, he drove off in his car to first dump the bag containing the victim's clothes, the hacksaw, and the knife used to dismember the body, into a dumpster. Thereafter, he purchased two five-gallon cans, which he filled with gasoline. He loaded them in the car and drove to a "mini-warehouse" where his motorcycle was hidden. Leaving the bag of body parts there, he then drove back to the church to drop off the gasoline cans.

From there, the defendant drove to the boarding house where the victim had been renting a room. He parked his car a few streets away, walked over to the house, and placed his own wallet in the front room area. He then took a taxi back to the warehouse, leaving his car parked near the boarding house. Inside his car he left the following items: a beer bottle; a towel smeared with the defendant's own blood that he had withdrawn the previous night; some of the defendant's credit cards; and the victim's tackle box, rod, and reel. The defendant had placed the victim's fingerprints on the beer

bottle and credit cards by taking the victim's severed forearm and applying the hand to these items.

Back at the warehouse, he then proceeded on motorcycle, taking the bag of body parts with him, to Kentucky Lake where he rented a boat. Once on the lake, the defendant tied a weight of some sort to this bag and dropped it into the water. He returned to the church after dark, and, according to his testimony, he removed tattooed pieces of flesh from each of the victim's arms, flushing the pieces down the toilet. Finally, he wrapped the body in a carpet, placed chopped wood in the attic, and then doused the church with gasoline. After one false start, the defendant finally set the church ablaze during the early morning hours of Tuesday, June 16, 1987.

Later that day, the defendant traveled to Memphis and paid cash for a two-night stay in a motel. He only stayed the first night, during which he entertained himself by attending a Double A baseball game. The following day, June 17, he threw his .38 caliber pistol into the Mississippi river and called his lawyer. He testified that he "just knew that [he] was in trouble ... that [he] had killed somebody." He then *153 drove back home to Nashville to turn himself in for the murder.

Meanwhile, the fire department officials conducted a search of the burned church and discovered the body wrapped in a carpet. Medical examiner Dr. Charles Harlan, who conducted the autopsy on the victim's body, testified that the decapitation, the amputation of the right forearm, and the excisions of skin from both shoulders all occurred after the victim's death. However, he further testified that "the cause of death [was] not present in the dismembered body, [but was] located somewhere within the head." His examination at the Forensic Science Center revealed that the head

> was very neatly cut all the way across any flesh area. It was just as smooth as if a steak were to be fileted.... When it came to the bone in the back--through the vertebra in the back, then those areas were--had real distinct saw marks.... The right arm was cut just below the elbow. It also was obvious that it was cut very straight, very neat, until it got to the bone portion and it was a sawing and grains going across the bone that were obvious to my eye.

On June 18, 1987, police apprehended the defendant. Detective Robert Moore testified that the defendant's demeanor upon arrest was "very matter of fact," not demonstrating any emotion whatsoever. Although the defendant was cooperative, Sergeant Moore explained, "I guess I was looking for some remorse or some signs. After being involved in a three day manhunt, like we had, I expected an awful lot more than what I saw. But I saw nothing but just plain straight up-just no sign of emotion at all."

The State also presented the testimony of Bishop Ronald Banks. Bishop Banks described in general the organization of the Emmanuel Churches of Christ, the financial structure of the church as a whole, the responsibilities of the Bishop and Assistant Bishop Overseer, and the role of a pastor for a local congregation. According to Bishop Banks, David Terry, as the pastor of a local church, had ultimate control over all business matters, the theological doctrine, and any administrative matters concerning his individual church; however, he was required to abide by the rules and bylaws of the church organization. He failed to follow church rules when he deposited the proceeds of the sale of some church property into the tithing account, from which he was required to draw his salary, instead of into the general fund of the church. Moreover, the defendant's withdrawal of money in excess of his salary was in direct violation of church rules.

In mitigation of the sentence, the defense presented testimony from some members of the defendant's family, former parishioners, prison personnel, and the defendant himself. The testimony from the defendant's deceased father, John Calvin Terry, recorded from a previous proceeding, was read to the jury. Mr. Terry, Sr., explained how he and his son worked together in the ministry and further testified to his son's devotion to his family and to his ministry. Rita Kemp, a member of the Emmanuel Churches of Christ, described how the defendant, of his own volition, visited her ailing father each time he was admitted to the hospital. She stated that her father always felt uplifted by the defendant's prayers and seemed comforted after his visits. Fellow prison inmate Michael Whitsey testified that the defendant helped him turn his life around through prayer sessions and bible study while they were both incarcerated.

Mr. Frank Bainbridge, an ordained deacon in the Catholic Church, testified that he holds ecumenical nondenominational *154 Christian services in prison. After meeting the defendant in 1990, he has maintained a steady relationship with the defendant. He testified that the defendant often appears "terribly depressed [and] guilt-ridden about what had happened."

The defendant's brother, Fred Russell Terry, maintained that the defendant, as a child, was one who never caused any trouble or problems but was well-loved by everyone. He testified to the defendant's "total commitment" to the "church, family, mom and dad, his family, our family." However, he noticed a change in his brother's disposition when, in early 1987, he visited the defendant and found him to appear "troubled, maybe from the stress of the church or stress from something." The defendant's wife, Brenda Terry, also testified as to his changing behavior during the period between 1984 and 1987. She stated that he initially experienced intense mood swings and, over time, he became very withdrawn. Moreover, she testified that during that time, he had difficulty sleeping, he was gaining weight, and he was unable to perform sexually.

Dr. Robert Begtrup, a retired psychiatrist, who had originally evaluated the defendant's competency to stand trial, testified that although the defendant was not insane at the time of the offense and was legally competent to stand trial, the defendant was suffering from major depression when he committed the murder. Dr. Begtrup characterized the defendant's depression as a serious mental illness. He testified that the defendant's problem probably started four years prior with the death of his mother, with whom he was very close and who he regarded as his "only confidante." Dr. Begtrup found that the defendant had never recovered from his mother's

death.

The defendant testified on his own behalf. He described his disappointment when the Bishop refused to retire, his subsequent feelings of inadequacy and lack of control over his life, and his attempts to commit suicide. The defendant conceded that he contemplated killing James Matheney before the date of the incident and expressed his sorrow and remorse over "the worst thing that [he had] ever done."

The defense also presented other witnesses who testified that the defendant frequently helped others while he was incarcerated by holding prayer sessions, bible study, and otherwise counseling his fellow inmates. Several witnesses described the defendant as a model prisoner, a model employee in the prison's data processing unit, and a regular participant in worship services at the prison.

At the close of the proof, the jury was instructed on the following statutory aggravating factors: (1) the murder was especially heinous, atrocious, or cruel in that it involved depravity of mind; and (2) the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant for his underlying crime of embezzlement of church funds. The jury was also instructed to consider the following non-exclusive list of mitigating circumstances:

(1) The defendant has no significant history of prior criminal activity.

(2) The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(3) Prior to the commission of the murder, the defendant had been a positive and contributing member of the community, as a caring pastor, husband, and parent.

(4) The defendant has accepted responsibility for his crime and has exhibited remorse.

*155 (5) For the last ten (10) years, the defendant has exhibited a serious and consistent effort to rehabilitate himself, by functioning at a high level within the limits of his confinement.

(6) The capacity of the defendant to appreciate the wrongfulness of his conduct or to conform his conduct to the requirements of the law was substantially impaired as a result of mental disease or defect or intoxication [,] which was insufficient to establish a defense to the crime but which substantially affect[ed] his judgment.

(7) Any aspect of the defendant's character or record or any aspect of the circumstances of the offense favorable to the defendant which is supported by the evidence.

[1] The jury found that the State proved the two statutory aggravating circumstances beyond a reasonable doubt, and that these two aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. (FN5) Consequently, on August 6, 1997, the defendant was again sentenced to death. The trial court entered a judgment in accordance with the jury's verdict, and the Court of Criminal Appeals later affirmed the sentence.

The case was automatically docketed in this Court for review of the death sentence. (FN6) After considering the record in this case, this Court requested additional briefing and argument on the following issues: (1) whether the prosecutor presented non-statutory aggravating circumstances to be weighed against the mitigating evidence, and if so, whether such error adversely affected the sentence; (2) whether Tennessee Code Annotated section 39-13-204 confines the jury to weighing only statutory aggravating circumstances against the mitigating evidence, and whether allowing the jury to consider a "myriad of factors" in deciding whether death is the appropriate punishment violates the defendant's federal right to due process of law; (3) whether Tennessee Code Annotated section 39-2-203(i)(5) is unconstitutionally vague, and whether the evidence is sufficient to support the finding of the aggravator in this case; (4) whether the Tennessee Code Annotated section 39-2-203(i)(6) aggravating circumstance is unconstitutionally overbroad as applied, and whether the evidence is sufficient to support the finding of the aggravator in this case; and (5) whether the death sentence is an excessive and disproportionate punishment given the nature of the defendant and the circumstances of this case.

After reviewing the record and considering the issues raised by the defendant, we find no reversible error and affirm the judgment of the trial court and the judgment of the Court of Criminal Appeals.

*156 ANALYSIS

I. Prosecutorial Misconduct

The defendant first contends that the State erred in its closing argument when it asked the jury to "consider in the balance," "weigh ... in the balance," and "put in the balance" six "unique circumstances" against the mitigating proof. Specifically, the prosecutor listed the following factors on a handwritten chart for the jury to consider: (1) "extreme premeditation"; (2) "innocent victim"; (3) "brutality of murder"; (4) "violated private trust"; (5) "burning a church"; and (6) "concealment of crime." Next to these factors, the prosecutor then listed several of the mitigating factors in this case.

The defendant argues that the prosecution was improperly urging the jury to treat these "unique circumstances" in the same manner as aggravating circumstances, *i.e.*, as non-statutory aggravating circumstances to be weighed in the balance against the mitigating evidence. Although the defendant concedes that the prosecutor cautioned the jury that these six "unique circumstances" were not aggravating factors, his concern is that the State proceeded to treat those circumstances or factors as non-statutory aggravators by urging the jury to weigh them against the mitigating evidence. As a result, the defendant contends that the prosecutor engaged in misconduct that created a " 'substantial risk that the death penalty [was] inflicted in an arbitrary or capricious manner,' *i.e.*, on the basis of

factors other than those deemed by the legislature to be proper predicates for the sentencing determination." *Cozzolino v. State,* 584 S.W.2d 765, 768 (Tenn.1979) (quoting *Gregg v. Georgia,* 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)). In response, the State maintains that it was properly arguing facts and circumstances to establish and assign weight to the two statutory aggravating circumstances.

[2][3][4][5] This Court has long recognized that closing arguments are a valuable privilege that should not be unduly restricted. *See State v. Sutton,* 562 S.W.2d 820, 823 (Tenn.1978) (citing *Smith v. State,* 527 S.W.2d 737 (Tenn.1975)). Consequently, attorneys are given greater leeway in arguing their positions before the jury, and the trial court has significant discretion in controlling these arguments, to be reversed only upon a showing of an abuse of that discretion. *Id.* In a capital sentencing hearing, evidence may be presented tending to establish or rebut any statutory aggravating circumstances or mitigating circumstances. Moreover, a jury must be permitted to consider evidence pertaining to the nature and circumstances of the crime even if the proof is not necessarily related to a statutory aggravating circumstance. *State v. Nesbit,* 978 S.W.2d 872, 890 (Tenn.1998). However, the State may not rely upon *non-statutory aggravating circumstances* in seeking the imposition of the death penalty. *See id.; see also State v. Thompson,* 768 S.W.2d 239, 251 (Tenn.1989).

[6] At the time of the defendant's offense, Tennessee's capital sentencing procedure required the jury to make two separate determinations before imposing a sentence of death: (1) that the State has proven at least one statutory aggravating circumstance beyond a reasonable doubt; and (2) that the proven statutory aggravating circumstance(s) outweigh any mitigating circumstances. Tenn.Code Ann. § 39-13-204(g)(1). Therefore, in determining whether death is the appropriate punishment for the offense and for the individual defendant, the jury is free to consider "a myriad of factors" relevant to punishment, that is, relevant to establishing and assigning weight to aggravating and mitigating ***157** circumstances. *Nesbit,* 978 S.W.2d at 890. This "myriad of factors" serves to individualize the sentence imposed on each defendant to insure that the sentence is just and appropriate considering the characteristics of the defendant and the circumstances of the crime. *See Zant v. Stephens,* 462 U.S. 862, 875, 879, 103 S.Ct. 2733, 2741, 2744, 77 L.Ed.2d 235 (1983). Evidence appropriate for the jury's consideration can include the nature and circumstances of the crime; the defendant's character, background history, and physical condition; any evidence tending to establish or rebut the aggravating circumstances; and any evidence tending to establish or rebut any mitigating factors. Tenn.Code Ann. § 39-13-204(c).

[7] We have examined the record in light of the defendant's claims and find that the State's argument concerning "unique circumstances" was not improper for two reasons. First, the six factors were within the realm of permissible evidence contemplated by the statute. Second, after reviewing the closing argument as a whole, we conclude that the prosecutor properly offered these "unique circumstances" as specific evidence to support and give weight to the two statutory aggravating circumstances: (1) that the murder was heinous, atrocious, or cruel in that it involved depravity of mind, Tenn.Code Ann. § 39-2-203(i)(5); and (2) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant, Tenn.Code Ann. § 39-2-203(i)(6).

The record reflects that the prosecutor began his closing argument by introducing the two statutory aggravating circumstances to be established and by informing the jury that it had to find that at least one of them had been proven beyond a reasonable doubt before considering a sentence of death. Specifically, the prosecutor stated:

> We've talked about your duties as jurors. And the Judge is going to get very specific with you. But, basically, it's like there's two charges here that we have to prove beyond a reasonable doubt. You have to find at least one of them before you go to the next part of your consideration. Have we proved this was heinous, atrocious, or cruel? Have we proved the defendant murdered James Matheney as part of the plan to avoid being prosecuted?

The prosecutor then prefaced his discussion of the evidence tending to establish these two aggravating circumstances as follows:

> Now, when you analyze and balance and you talk all about this, individually, and now, collectively, and the Judge will give you more instructions about that, these two Aggravating Factors, if you decide that one of them has been proven beyond a reasonable doubt, then you have to balance them against anything favorable to the defendant that's been introduced. They're called Mitigating Factors. And how do you balance them?
>
> Well, there are murders and there are murders. You can kill someone to avoid an arrest by driving by in a car and shooting them, no thought, no planning. But that's not exactly the same thing we have here. Every case is different. Every case depends on its facts. So it's the facts, Ladies and Gentlemen, that decides how important, how serious, how bad this crime is.
>
> Well, let me show you some of the facts, some of [the] things that I think you should consider in the balance, on how important, how weighty what he did or things that make it bad. These are not Aggravating Factors, but they are ***158** evidence that make this crime more serious.

The defendant argues that urging the jury to consider some of the facts in the balance was "prosecutorial sleight of hand" for treating the specific facts, or "unique circumstances," in the same manner as aggravating circumstances, *i.e.,* to be weighed in the balance against mitigating evidence. Although the prosecutor did approach the line of impermissible conduct in his argument, we find that the trial judge did not err in failing to restrict the prosecutor's line of argument. The complained of portion of the closing argument,

when viewed in context with the prosecutor's argument as a whole, reveals that the prosecutor first, properly identified the two aggravating circumstances to be proven, and second, offered six factors to establish or give weight to these aggravating circumstances.

Even assuming that the prosecutor approached the line of impermissible conduct, any adverse effects from his closing argument were erased by the trial court's instructions to the jury as to its role in considering the evidence. Specifically, the trial judge first instructed the jury that it could only consider the two statutory aggravating circumstances presented by the State as the basis for determining whether the death penalty would be appropriate in this case. The jury was then told that it had to unanimously find that the State had proven at least one of the two aggravators beyond a reasonable doubt before considering a penalty of death; only upon this unanimous determination could the jury then consider mitigating evidence. The trial court explained, "If you conclude that any evidence supports a mitigating circumstance or circumstances, then you should consider that mitigating circumstance or circumstances to be established, and then determine the weight to which it is entitled." Finally, the trial court instructed the jury that if it unanimously found that the aggravators outweighed any mitigating circumstances, the jury shall impose a sentence of death.

It is a well-established presumption in law that jurors are deemed to have followed the instructions given by the court, *Nesbit,* 978 S.W.2d at 894, and we see no evidence from the record to rebut this presumption. In fact, the record reflects that after the verdict was read, each juror was polled to determine whether that individual imposed a sentence of death in accordance with the trial court's instructions. The record indicates that all twelve jurors, individually and collectively, imposed the death penalty after finding first, that the two statutory aggravating circumstances were proven beyond a reasonable doubt, and second, that the aggravators outweighed the mitigating circumstances.

Therefore, after carefully reviewing the record, we simply do not find evidence that the jury was presented with non-statutory aggravating circumstances to be weighed against mitigating circumstances. Rather, the jury was properly asked to consider certain facts and circumstances of the offense establishing and giving weight to the existence of the two aggravating circumstances. Accordingly, we hold that the prosecutorial argument was not improper, and therefore, this issue is without merit.

II. Consideration of Non-Statutory Aggravating Factors

The defendant continues to argue that the trial court erred in allowing the jury to consider and weigh non-statutory aggravating circumstances as a basis for imposing the death penalty, thereby violating the defendant's constitutional rights. As we have previously discussed at length, the prosecutor clearly explained to the jury that the State sought to prove only two ***159** statutory aggravating circumstances. All evidence presented served only to establish and give weight to these aggravators. Because we hold that the State did not advance non-statutory aggravating circumstances, this issue is without merit.

III. Heinous, Atrocious, or Cruel Aggravating Circumstance (i)(5)

The defendant also challenges the application of the statutory "heinous, atrocious, or cruel" aggravating circumstance. At the time of the offense, this aggravator, set out in Tennessee Code Annotated section 39-2-203(i)(5) (1982), provided that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." (FN7) The defendant, citing as authority the decisions in *Houston v. Dutton,* 50 F.3d 381 (6th Cir.1995), and *Coe v. Bell,* 161 F.3d 320, 332-33 (6th Cir.1998), asserts that the definitions of "heinous," "atrocious," and "cruel" are unconstitutionally vague and that the modifier "torture or depravity of mind" does not serve to cure this problem of vagueness.

[8][9] The role of the aggravating circumstance is to "circumscribe the class of persons eligible for the death penalty." *See Barclay v. Florida,* 463 U.S. 939, 952-56, 103 S.Ct. 3418, 77 L.Ed.2d 1134 (1983); *Zant,* 462 U.S. at 877-78, 103 S.Ct. 2733. Statutory aggravating circumstances are constitutional if they meet two requirements: " 'First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague.' " *Carter v. Bell,* 218 F.3d 581, 607 (6th Cir.2000) (quoting *Tuilaepa v. California,* 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994)). Therefore, the nature of the aggravator must be sufficiently definite so as to prevent arbitrary or discriminatory imposition of death.

[10] We have consistently upheld the constitutionality of this pre-1989 aggravating circumstance, and we have rejected the argument that the terms are vague or overbroad. *See Strouth v. State,* 999 S.W.2d 759, 764 (Tenn.1999); *State v. Middlebrooks,* 995 S.W.2d 550, 555-56 (Tenn.1999); *State v. Blanton,* 975 S.W.2d 269, 280 (Tenn.1998); *State v. Thompson,* 768 S.W.2d 239, 252 (Tenn.1989). In *State v. Williams,* 690 S.W.2d 517, 527-30 (Tenn.1985), we examined the language of the (i)(5) aggravating circumstance and clarified its application by defining each term according to its ordinary and natural meaning. The trial court in this case used the definitions set forth in *Williams* in its instructions to the jury:

"Heinous" means grossly wicked or reprehensible; abominable; odious; vile.

"Atrocious" means extremely evil or cruel, monstrous, exceptionally bad, abominable.

"Cruel" means disposed to inflict pain or suffering; causing suffering; painful.

"Depravity" means moral corruption, wicked or perverse act. (FN8)

***160** [11] We continue to reject the claim that this

aggravating circumstance is vague or overbroad. Furthermore, we conclude that the defendant's reliance on *Houston v. Dutton* and *Coe v. Bell,* Sixth Circuit habeas corpus decisions holding the (i)(5) aggravating circumstance unconstitutionally vague, is misplaced. In *Middlebrooks,* we recognized that the trial courts in those cases either failed to define the terms in their instructions to the jury or provided only incomplete definitions of the terms. (FN9) *Middlebrooks,* 995 S.W.2d at 557. This was not the situation in this case. Moreover, and more importantly, this Court is not bound by federal court decisions other than those of the United States Supreme Court, *id.* (citing *State v. McKay,* 680 S.W.2d 447, 450 (Tenn.1984)), which has not yet held this aggravating circumstance unconstitutional. Therefore, for the foregoing reasons, we hold that the (i)(5) aggravating circumstance is sufficiently definite so as to prevent arbitrary or discriminatory imposition of the death sentence.

[12] The defendant next contends that the evidence is insufficient to support the jury's finding that this murder involved "depravity of mind." When the sufficiency of the evidence supporting an aggravating circumstance is challenged, the appellate court must determine whether, after viewing the evidence in the light most favorable to the State, a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. *See State v. Nesbit,* 978 S.W.2d 872, 886 (Tenn.1998); *State v. Cazes,* 875 S.W.2d 253, 259 (Tenn.1994).

[13] The evidence demonstrates that the defendant had devised an elaborate scheme to simulate his own death and then disappear under an assumed identity. His plan involved murdering an individual similar in size to himself and dismembering the corpse to remove identifiable body parts so as to make the body appear to be his own. Consequently, the defendant selected James Matheney, who was approximately the same size and often wore the defendant's clothes. For months, he worked to foster a close relationship with the victim. Using his position as pastor, he counseled the victim, employed him, found and paid for his housing, and eventually earned his trust and friendship. At the same time, he was hiding weapons at the scene of the crime in preparation for the murder. Finally, on the pretense of taking the victim on a fishing trip, the defendant shot and killed the victim at his own church. After examining the record, we conclude that this extensive plan to single out the victim for execution illustrates the "wickedness" and "perverseness" of the murder and is evidence from which a rational jury could infer the defendant's depraved mind at the time he fatally shot the victim.

Moreover, the dismemberment of the corpse establishes depravity of mind in this case. The key inquiry is the defendant's state of mind at the time of the murder. In *Williams,* we held that if acts occurring after the death of the victim are relied upon to show the defendant's depravity ***161** of mind, then such acts must be shown to have occurred close to the time of the death to provide a rational basis for the trier of fact to infer that the defendant's state of mind at the time of the killing was depraved. *Williams,* 690 S.W.2d at 529-30. The defendant argues that the time factor propounded by *Williams* is too relative and uncertain a standard for distinguishing those persons eligible for the death penalty. However, the time factor merely assists in directly relating the post-mortem mutilation to the commission of the murder, thereby establishing the defendant's depravity of mind at the time of the murder. As the Court of Criminal Appeals reasoned in this case, any dismemberment of a corpse can establish depravity of mind if the acts can be considered "incident to the murder and not ... separate, distinct or independent from it."

Viewing the evidence in the light most favorable to the State, the record demonstrates that the defendant dismembered the victim's body as soon as fifteen minutes to one hour after the victim's death. Additionally, the defendant concedes that the murder was committed to simulate his own death, and that the dismemberment of identifying body parts was required to conceal the victim's identity. Specifically, the defendant decapitated the body and removed a forearm; bagged the body parts and disposed of them in a lake; sliced off pieces of tattooed flesh and flushed them down the toilet; and finally, set fire to his own church to burn the body beyond all recognition. We conclude that the defendant's post-mortem acts occurred in close temporal proximity to the victim's death, were incident to the murder as part of a plan, and were of such a despicable nature that a rational jury could easily infer the defendant's depraved mind at the time of the murder.

Accordingly, after reviewing the evidence in the light most favorable to the State, we hold that the evidence is more than sufficient for any rational trier of fact to find, beyond a reasonable doubt, that the murder was especially heinous, atrocious, or cruel in that it involved depravity of mind.

IV. Murder to Prevent Arrest Aggravating Circumstance (i)(6)

The next issue is whether the (i)(6) aggravating circumstance was supported by the evidence in this case. This aggravating circumstance provides that "[t]he murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another." Tenn.Code Ann. § 39-2-203(i)(6) (1982). At the sentencing hearing, the State theorized that the defendant killed the victim as part of his plan to avoid arrest or prosecution for his embezzlement of church funds. The defendant argues that this case presents a novel factual situation in which the murder did not involve a victim of, or a witness to, another crime, but rather, it involved an unsuspecting individual completely unaffiliated with the defendant's underlying crime of embezzlement. Thus, the defendant asserts, the evidence does not support the finding that this murder was committed to avoid arrest or prosecution for the embezzlement of church funds. In response, the State argues that this aggravator does not require that the murder victim know or be able to identify the defendant. Thus, the State argues, the aggravator was appropriately applied to the evidence in this case.

Again, we reiterate that the purpose of legislatively defined aggravating circumstances is to effectively narrow the class of death-eligible defendants. "If the sentencer fairly could conclude that an aggravating ***162** circumstance applies to every

defendant eligible for the death penalty, the circumstance is constitutionally infirm." *See Arave v. Creech,* 507 U.S. 463, 474, 113 S.Ct. 1534, 123 L.Ed.2d 188 (1993). We have held that the language of this aggravator is sufficiently clear to put defendants on notice of what homicides are punishable by death. *See State v. McCormick,* 778 S.W.2d 48, 53 (Tenn.1989). Moreover, this statute is sufficiently definite to inform the jury of the evidence to be proven before a death sentence may be imposed. *Id.*

The defendant insists that because the victim in this case was not the victim of the defendant's crime of embezzlement, nor a witness to this crime, nor even a law enforcement officer attempting to arrest the defendant for the underlying crime, this aggravator may not be applied. We have previously held that this statute is not limited in its application to only these situations. *See State v. Hall,* 976 S.W.2d 121, 133 (Tenn.1998) (refuting the notion that (i)(6) applies only when a victim knows or can identify the defendant). Rather, the focus must remain on the defendant's motives for committing the murder. *See Hall,* 976 S.W.2d at 133 (citing *State v. Smith,* 868 S.W.2d 561, 580 (Tenn.1993)). We do not require that the desire to avoid arrest or prosecution be the sole motive for killing the victim. Instead, such a desire need only be one of the purposes motivating the defendant to kill. *See State v. Carter,* 714 S.W.2d 241, 250 (Tenn.1986).

[14] While the facts giving rise to the crime of embezzlement are undisputed, (FN10) there is also evidence, when viewed in a light most favorable to the State, from which a reasonable jury could find that the defendant committed murder, at least in part, to prevent his apprehension for the theft. The record shows that the defendant painstakingly planned his escape to leave behind the "old David Terry" and start his life anew, under a new identity and indeed, with a new appearance such that he could remain "dead" forever. For several months, he purchased legal documents under a new name, purchased additional life insurance for the provision of his family, and carefully planned the murder itself to make it look like he died at the hands of James Matheney. Once the murder was committed, the defendant altered his appearance so as to avoid detection and possible apprehension. As Sergeant Moore testified,

> I had seen photographs ... of John David Terry ... [but] the person that I saw that morning, I had no idea who I was looking at. It was just a striking difference.... [H]is head was shaved, he had a dark tan, he was in casual khaki clothes and he just looked entirely ***163** different. I wouldn't have known him on the street.

The defendant testified that he had considered creating the illusion that he had been brutally kidnapped, or that he otherwise suffered some brutality before "disappearing," leaving only his bloodstains as evidence of his questionable demise. Given these circumstances, a reasonable jury could conclude that because of his desire to avoid arrest or prosecution for his theft, he decided, at least in part, to commit murder and leave behind a body, charred beyond all recognition, to prevent any investigation that would have inevitably occurred had he merely "disappeared." As the State aptly phrases the principle, "law enforcement officials do not look for dead men, and they are certainly not prosecuted." As the State theorized in its closing argument,

> He told you that he was thinking about committing suicide, but the evidence is not there to support it. The evidence is there to support that this man was going to selfishly leave his church, leave his family, steal the money, and start new somewhere else. There's no evidence to support that he was going to stick a gun in his mouth and pull the trigger like he told you he tried to do many times but simply couldn't do it. There's no evidence to support that, because he didn't have any qualms at all about pulling that trigger and shooting James Matheney.
>
> He's planning to leave because he's realized he stole the money, he's going to take out a big amount to plan his new life. But he has to leave behind the old David Terry so that he can't be prosecuted in his new life, so that he can't be found. So he plans the plan that you've heard about. He plans to murder James Matheney.
>
> ....
>
> ... The murder was absolutely committed for no other reason other than for Mr. Terry to get away, to get away from the church and start a new life, because he'd been stealing. And he knew that he'd eventually get caught and would be prosecuted.

Examining the evidence in the light most favorable to the State, we hold that a rational jury could have concluded beyond a reasonable doubt that the defendant committed this murder, at least in part, to prevent his arrest for the separate crime of theft.

V. Proportionality Review

[15][16][17][18] We now conduct comparative proportionality review to determine whether the defendant's sentence of death for premeditated first degree murder "is disproportionate to the sentences imposed for similar crimes and similar defendants." *State v. Bland,* 958 S.W.2d 651, 664 (Tenn.1997); *see also* Tenn.Code Ann. § 39-13-206(c)(1)(D) (requiring reviewing courts to determine whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the nature of the crime and the defendant). The purpose of comparative proportionality review is to ensure that the death penalty is applied consistently and not arbitrarily or capriciously. The presumption is that a sentence of death is proportional to the crime of first degree murder, *State v. Hall,* 958 S.W.2d 679, 699 (Tenn.1997), as long as sentencing procedures focus discretion on the " 'particularized nature of the crime and the particularized characteristics of the individual defendant,' " *McCleskey v. Kemp,* 481 U.S. 279, 308, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987) (quoting *Gregg v. Georgia,* 428 U.S. 153, 206, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). Applying the precedent-seeking approach, we undertake ***164** to compare this case to other cases in which the defendants were convicted of the same or similar crimes. *Bland,* 958 S.W.2d at 664. We look at the facts and circumstances of the crime, the characteristics of the defendant, and the aggravating and mitigating factors involved. *Id.* Because no two cases involve

identical circumstances, our objective cannot be to limit our comparison to those cases where a defendant's death sentence "is perfectly symmetrical," but only "to identify and to invalidate the aberrant death sentence." *Id.* at 665.

[19][20] In *Bland* and its progeny, we enumerated several nonexclusive factors relevant to the process of identifying and comparing similar cases. These include: (1) the means of death; (2) the manner of death (*e.g.*, violent or torturous); (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victim's circumstances including age, race, and physical and mental conditions; and the victim's treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on nondecedent victims. *Id.* at 667. Moreover, we have identified several nonexclusive factors relevant to the comparison of the characteristics of defendants: (1) the defendant's prior criminal record or prior criminal activity; (2) the defendant's age, race, and gender; (3) the defendant's mental, emotional or physical condition; (4) the defendant's involvement or role in the murder; (5) the defendant's cooperation with authorities; (6) the defendant's remorse; (7) the defendant's knowledge of the helplessness of victim(s); (8) the defendant's capacity for rehabilitation.

[21] Applying these factors, we note that the evidence in this case demonstrates that the victim was most likely shot in the back of the head. There is no evidence of provocation. At least one motivation for this killing was for the defendant to stage his death and escape into obscurity, thereby avoiding arrest or prosecution for his underlying crime of embezzlement. The defendant killed the victim in his own church. The record indicates that the defendant had planned this murder for months. He ordered books to learn about how to change his identity and, using this information, he extensively researched obituaries at the library until he located a decedent whose identity he could easily adopt. Putting his plan into motion, he created or otherwise procured documents necessary to establishing his new identity. The defendant also carefully selected the murder victim--a man approximately the same size as himself--whose body would appear to be his own. For weeks prior to the murder, the defendant fostered a close relationship with the victim while simultaneously hiding weapons, clothes, and money taken from the church in anticipation of committing the murder and making a clean escape. Once the victim was dead, the defendant expertly dismembered the body and disposed of the body parts in a lake. After setting the church on fire, the defendant escaped to Memphis.

The defendant, a middle-aged Caucasian male, was the pastor of a local church and has no prior record of criminal activity. Although the defense presented expert proof that he suffered from major depression at the time of the murder, the proof also demonstrates that he did not suffer from such a severe mental illness so as not to understand the criminality of his acts. Moreover, the record reflects that upon arrest, the defendant, while cooperative with authorities, was devoid of any feelings of remorse. While incarcerated, however, the defendant has shown remorse and has demonstrated a continuous effort to rehabilitate *165 himself by participating in religious activities, counseling fellow inmates, and working hard at his job in prison to send money on a monthly basis to his wife and daughter.

While the facts of this case are admittedly unique, our research nevertheless reveals several cases containing similar circumstances. In *State v. Carter,* 714 S.W.2d 241 (Tenn.1986), the jury found that the defendant's motive for the murder was to kill the victim to avoid arrest for another crime. The defendant had been planning to steal an automobile and decided upon the victim's truck. The defendant shot the victim--a stranger to the defendant and completely unsuspecting of the impending crime--and disposed of the body in a lake in an attempt to conceal the murder and to avoid arrest. The jury imposed the sentence of death after finding the (i)(6) and (i)(7) aggravating circumstances beyond a reasonable doubt.

In *State v. Smith,* 868 S.W.2d 561 (Tenn.1993), the death penalty was imposed and upheld for a forty-year-old defendant who murdered his estranged wife and two stepsons. Witnesses testified that for several months prior to the murder, the defendant had publicly plotted to kill his family. Expert testimony revealed that he mutilated two of the bodies shortly after the victims' deaths, and the jury concluded that the evidence was sufficient to support the aggravating circumstance that the offense was "especially heinous, atrocious, or cruel in that it involved torture or depravity of mind." Tenn.Code Ann. § 39-2-203(i)(5). Moreover, the jury found that the proof supported a finding that at least one motive for killing the step-sons was the threat they posed of the defendant's apprehension. Tenn.Code Ann. § 39-2-203(i)(6).

In *State v. Zagorski,* 701 S.W.2d 808 (Tenn.1985) , two victims died from gunshot wounds at the hand of the defendant. The defendant and the victims planned to meet at a designated location in the woods and conduct a drug transaction; however, upon arriving at the meeting place, the victims were shot and their money stolen. The defendant also slit their throats and left them in the woods. Due to the advanced stage of decomposition of the bodies, the pathologist performing the autopsy was unable to tell whether the victims died before or after their throats had been cut. The jury found the evidence of the needless mutilation of the victims sufficient to infer that the defendant possessed a depraved state of mind at the time of the killings. Therefore, the jury imposed a sentence of death for each killing, finding that (1) the murders were committed by the defendant while he was engaged in robbing the victims, Tenn.Code Ann. § 39-2-203(i)(7); and (2) that the murders were especially heinous, atrocious, or cruel in that they involved torture or depravity of mind, Tenn.Code Ann. § 39-2-203(i)(5).

In *State v. Bondurant,* 4 S.W.3d 662 (Tenn.1999), the defendant beat an unarmed and unsuspecting victim to death after a card game. The beatings continued for thirty minutes after the victim had died. Immediately thereafter, the defendant and his brother dismembered the victim's body, transported the pieces to their parents' home, and burned the

corpse. Mitigating evidence portrayed the defendant as an exemplary son, a good family man, and a hard-working employee. The jury convicted the defendant of first degree premeditated murder and arson and sentenced the defendant to death; the defendant's convictions were reversed and the case remanded for a new trial on other grounds.

Moreover, the sentence of death has been affirmed in cases containing similar mitigating evidence. *See State v. Burns,* 979 S.W.2d 276 (Tenn.1998) (upholding a ***166** death sentence in spite of evidence of the defendant's religious faith and involvement); *State v. Pike,* 978 S.W.2d 904 (Tenn.1998) (upholding a death sentence even though defendant had no significant history of criminal activity and was apparently mentally disturbed at the time of the murder); *State v. Hall,* 958 S.W.2d 679 (Tenn.1997) (upholding a death sentence even though defendant had no prior criminal record and had a personality disorder and severe emotional problems at the time of the murder).

We have also found one somewhat similar case in which the death penalty was not imposed. In *State v. Harris,* 989 S.W.2d 307 (Tenn.1999), the jury found the defendant guilty of first degree murder and imposed a sentence of life imprisonment without the possibility of parole. The defendant and her friends had carjacked the victim's truck late one night. The victim started screaming for help. Afraid that someone would hear the screams, one of the defendant's friends shot and killed the victim. The group then took the body to a deserted area, dismembered it, and buried it. At trial, the defendant presented evidence that she suffered from psychological disorders, was chemically dependent, and had been abused as a child. A clinical psychologist opined that the defendant participated in the murder of the victim because she is dependent upon men and was following her boyfriend's directions that night. The State sought the death penalty upon the basis of the (i)(5) and (i)(6) aggravating circumstances. The jury, based upon the extensive mitigating proof and the fact that the defendant was not the actual killer, returned a verdict of life imprisonment.

[22] Although the death penalty may be imposed for an offense involving circumstances similar to those of an offense in which only a sentence of life imprisonment is imposed, the death sentence is not disproportionate if this Court can ascertain some basis for the imposition of the lesser sentence. *Hall,* 958 S.W.2d 679, 699 (Tenn.1997). We find several factors that distinguish *Harris* from the case at bar: the defendant's extensive mitigating evidence consisting of her psychological disorders, substance abuse, and traumatic childhood involving sexual abuse occurring at an early age; the fact that the defendant did not fire the shot that killed the victim; and finally, the absence of the extreme premeditation that occurred in this case. Nevertheless, even if this case could not be distinguished, "the isolated decision of a jury to afford mercy does not render a death sentence disproportionate." *State v. Keen,* 31 S.W.3d 196, 222 (Tenn.2000).

The defendant argues that his situation is unique because, unlike the defendants in these other cases, he had selflessly served the community for many years prior to suffering a mental breakdown. Although the exact combination of facts and circumstances in this case is not replicated in our comparative pool of similar cases, no two cases are identical. Indeed, we have identified cases involving circumstances similar to the crime in this case, *i.e.,* extreme premeditation, an unarmed victim, mutilation of the victim's body, and concealment of the crime to avoid detection and arrest. Furthermore, we have identified cases containing similar mitigating evidence, *i.e.,* lack of prior criminal history, existence of mental illness, and involvement in religious activities. Based on our review of these cases in which the death penalty was upheld, we conclude that the defendant's case, taken as a whole, is not plainly lacking in circumstances that have previously justified death sentences. Accordingly, we conclude that the death sentence imposed for the premeditated murder of victim James Matheney was neither disproportionate ***167** to the penalty imposed in similar cases, nor arbitrarily applied.

CONCLUSION

In conclusion, we have carefully reviewed the record, and, based on the facts and circumstances of this case, we have determined that the defendant's allegations of error are without merit. There exists no evidence of prosecutorial misconduct; the evidence is sufficient to support the jury's finding of two statutory aggravating circumstances beyond a reasonable doubt; and the evidence supports the jury's finding that the aggravating circumstances outweigh the mitigating evidence beyond a reasonable doubt. With respect to issues not specifically addressed in this opinion, we agree with and affirm the decision of the Court of Criminal Appeals, authored by Judge David G. Hayes and joined by Judges David H. Welles and Norma McGee Ogle. Relevant portions of that opinion are attached as an appendix.

Therefore, we hold that the sentence of death was neither disproportionate, nor arbitrarily applied. The conviction and sentence of John David Terry is affirmed and shall be carried out on the 17th day of October, 2001, unless otherwise ordered by this Court or proper authority. As the record reflects that the defendant is indigent, costs of this appeal are assessed against the State of Tennessee.

BIRCH, J., filed a dissenting opinion.

ADOLPHO A. BIRCH, Jr., J., dissenting.

In a line of dissents beginning with *State v. Chalmers,* I have repeatedly emphasized my belief that Tennessee's comparative proportionality review protocol is inadequate and must be reformed. 28 S.W.3d 913, 923-25 (Tenn.2000) (Birch, J., concurring and dissenting); *see also, e.g., State v. Carruthers,* 35 S.W.3d 516, 581-82 (Tenn.2000) (Birch, J., concurring and dissenting); *State v. Keen,* 31 S.W.3d 196, 233-34 (Tenn.2000) (Birch, J., concurring and dissenting). I have pointed out three shortcomings of the current protocol: "the 'test' we employ [for comparative proportionality review] is so broad that nearly any sentence could be found proportionate; our review procedures are too subjective; and the 'pool' of cases which are

reviewed for proportionality is too small." *Chalmers,* 28 S.W.3d at 923 (Birch, J., concurring and dissenting). These flaws, in my view, must be corrected if this Court is to provide genuine assurance that disproportionate sentences of death will not be upheld. I adhere to the views I have expressed in these previous cases.

As I have stated before in the context of other dissents, "I am unwilling to approve of results reached through the use of a procedure with which I cannot agree." *See Coe v. State,* 17 S.W.3d 193, 248-49 (Tenn.2000) (Birch, J., dissenting). To date, the majority has made no discernible effort to correct the flaws in our comparative proportionality review protocol. Therefore, I dissent from the Court's decision to impose the death penalty in this case.

APPENDIX

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE

AT NASHVILLE

FEBRUARY SESSION, 2000

STATE OF TENNESSEE, Appellee,

vs.

JOHN DAVID TERRY, Appellant.

DAVIDSON COUNTY

Hon. J. Randall Wyatt, Jr., Judge

(Premeditated First Degree Murder)

***168** *For the Appellant:*

Brock Mehler

Michael E. Terry

Nashville, TN

For the Appellee:

Michael E. Moore

Solicitor General

Tonya G. Miner

Assistant Attorney General Criminal Justice Division

Victor S. (Torry) Johnson III

District Attorney General

John Zimmerman

Asst. District Attorney General

Nashville, TN

AFFIRMED

DAVID G. HAYES, Judge.

OPINION

The appellant, John David Terry, appeals as of right, his punishment of death by electrocution. In 1989, the appellant was convicted by a Davidson County jury of the premeditated murder of James Matheney and was sentenced to death. At the motion for new trial, the trial court affirmed the appellant's conviction but, finding that it had erroneously charged an invalid aggravating circumstance, granted a new sentencing hearing. (FN1) The State appealed this decision and our supreme court affirmed the action of the trial court. (FN2) *See State v. Terry* , 813 S.W.2d 420 (Tenn.1991). The appellant's case was remanded to the Criminal Court of Davidson County for re-sentencing. At the conclusion of the re-sentencing hearing in August 1997, the jury found the presence of two aggravating circumstances, *i.e.,* (1) that the murder was especially heinous, atrocious or cruel, Tenn.Code Ann. § 39-2-203(i)(5) (1982) (*repealed* 1989), and (2) that the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution, Tenn.Code Ann. § 39-2-203(i)(6). (FN3) The jury further determined that the mitigating circumstances did not outweigh the aggravating circumstances and imposed a sentence of death by electrocution. The trial court approved the sentencing verdict. The appellant appeals presenting for our review the following issues:

I. Whether the heinous, atrocious, cruel aggravating circumstance, Tenn.Code Ann. § 39-2-203(i)(5), is unconstitutionally vague;

II. Whether the evidence is sufficient to support application of the heinous, atrocious, cruel aggravating circumstance, ***169** Tenn.Code Ann. § 39-2-203(i)(5);

III. Whether Tenn.Code Ann. § 39-2-203(i)(6), murder perpetrated to avoid prosecution, is unconstitutionally vague;

IV. Whether the evidence is sufficient to support application of aggravating circumstance Tenn.Code Ann. § 39-2-203(i)(6), that the murder was perpetrated to avoid prosecution;

V. Whether prosecutorial misconduct during closing argument affected the verdict to the prejudice of the appellant;

VI. Whether Tennessee's death penalty statutes, Tenn.Code Ann. § 39-2-203 and § 39-2-205 are constitutional; and

VII. Whether the jury imposed an arbitrary and disproportionate sentence.

After review, we find no error of law requiring reversal. Accordingly, we affirm the jury's imposition of the sentence of death in this case.

Factual Background [DELETED]

Proof at the August 1997 Re-sentencing Hearing [DELETED]

I. Imposition of Aggravator (i)(5) [DELETED]

II. Imposition of Aggravator (i)(6) [DELETED]

III. Prosecutorial Misconduct [DELETED]

IV. Constitutional Challenges to Death Penalty

The appellant raises numerous challenges to the constitutionality of Tennessee's death penalty provisions. The appellant concedes that these issues have been previously rejected by the Tennessee Supreme Court, however, he raises these challenges to preserve them for future appellate review. Specifically, included within his challenge that the Tennessee death penalty statutes violate the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution, and Article I, Sections 8, 9, 16, and 17, and Article II, Section 2 of the Tennessee Constitution are the following:

1. Tennessee's death penalty statutes fail to meaningfully narrow the class of death eligible defendants, specifically, the statutory aggravating circumstances set forth in Tenn.Code Ann. § 39-2-203(i)(2), (i)(5), (i)(6), and (i)(7) have been so broadly interpreted whether viewed singly or collectively, fail to provide such a "meaningful basis" for narrowing the population of those convicted of first degree murder to those eligible for the sentence of death. (FN14) This argument has been rejected by our supreme court. *See State v. Vann,* 976 S.W.2d 93, 117 118 (Tenn.1998) (Appendix),*cert. denied,* 526 U.S. 1071, 119 S.Ct. 1467, 143 L.Ed.2d 551 (1999); *State v. Keen,* 926 S.W.2d 727, 742 (Tenn.1994).

2. The death sentence is imposed capriciously and arbitrarily in that

(a) Unlimited discretion is vested in the prosecutor as to whether or not to seek the death penalty. This argument has been rejected. *See State v. Hines,* 919 S.W.2d 573, 582 (Tenn.1995), *cert. denied,* 519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996).

(b) The death penalty is imposed in a discriminatory manner based upon economics, race, geography, and gender. This argument has been rejected. *See Hines,* 919 S.W.2d at 582; *State v. Brimmer,* 876 S.W.2d 75, 87 (Tenn.), *cert. denied,* 513 U.S. 1020, ***170** 115 S.Ct. 585, 130 L.Ed.2d 499 (1994); *Cazes,* 875 S.W.2d at 268; *State v. Smith,* 857 S.W.2d 1, 23 (Tenn.), *cert. denied,* 510 U.S. 996, 114 S.Ct. 561, 126 L.Ed.2d 461 (1993).

(c) There are no uniform standards or procedures for jury selection to insure open inquiry concerning potentially prejudicial subject matter. This argument has been rejected. *See State v. Caughron,* 855 S.W.2d 526, 542 (Tenn.), *cert. denied,* 510 U.S. 979, 114 S.Ct. 475, 126 L.Ed.2d 426 (1993).

(d) The death qualification process skews the make-up of the jury and results in a relatively prosecution prone guilty-prone jury. This argument has been rejected. *See State v. Teel,* 793 S.W.2d 236, 246 (Tenn.), *cert. denied,* 498 U.S. 1007, 111 S.Ct. 571, 112 L.Ed.2d 577 (1990); *State v. Harbison,* 704 S.W.2d 314, 318 (Tenn.), *cert. denied,* 476 U.S. 1153, 106 S.Ct. 2261, 90 L.Ed.2d 705 (1986).

(e) Defendants are prohibited from addressing jurors' popular misconceptions about matters relevant to sentencing, *i.e.,* the cost of incarceration versus cost of execution, deterrence, method of execution. This argument has been rejected. *See Brimmer,* 876 S.W.2d at 86 87; *Cazes,* 875 S.W.2d at 268; *Black,* 815 S.W.2d at 179.

(f) The jury is instructed that it must agree unanimously in order to impose a life sentence, and is prohibited from being told the effect of a non-unanimous verdict. This argument has been rejected. *See Brimmer,* 876 S.W.2d at 87; *Cazes,* 875 S.W.2d at 268; *Smith,* 857 S.W.2d at 22 23.

(g) Requiring the jury to agree unanimously to a life verdict violates *Mills v. Maryland* and *McKoy v. North Carolina.* This argument has been rejected. *See Brimmer,* 876 S.W.2d at 87; *Thompson,* 768 S.W.2d at 250; *State v. King,* 718 S.W.2d 241, 249 (Tenn.1986), *superseded by statute as recognized by, State v. Hutchison,* 898 S.W.2d 161 (Tenn.1994).

(h) The jury is not required to make the ultimate determination that death is the appropriate penalty. This argument has been rejected. *See Brimmer,* 876 S.W.2d at 87; *Smith,* 857 S.W.2d at 22.

(i) The defendant is denied final closing argument in the penalty phase of the trial. This argument has been rejected. *See Brimmer,* 876 S.W.2d at 87; *Cazes,* 875 S.W.2d at 269; *Smith,* 857 S.W.2d at 24; *Caughron,* 855 S.W.2d at 542.

3. Death by electrocution constitutes cruel and unusual punishment. This argument has been rejected. *See Black,* 815 S.W.2d at 179; *see also Hines,* 919 S.W.2d at 582. (FN15)

4. The reasonable doubt instruction violates due process. This argument has been routinely rejected. *See Vann,* 976 S.W.2d at 116 (Appendix); *State v. Nichols,* 877 S.W.2d 722, 734 (Tenn.1994); ***171.** *State v. Bush,* 942 S.W.2d 489, 504-05 (Tenn.1997).

5. The appellate review process in death penalty cases is constitutionally inadequate in that (1) the reviewing court cannot properly evaluate the proof due to the absence of written findings concerning mitigating circumstances; (2) the information relied upon for comparative review is inadequate and incomplete; (3) the methodology is flawed because the pool of cases is unduly narrow, the determination is entirely subjective, and the review fails to properly function as a safeguard. This argument has been rejected by our supreme court on numerous occasions. *See Cazes,* 875 S.W.2d at 270-71; *State v. Harris,* 839 S.W.2d 54, 77 (Tenn.1992), *cert. denied,* 507 U.S. 954, 113 S.Ct. 1368, 122 L.Ed.2d 746 (1993); *Barber,* 753 S.W.2d at 664. Moreover, the supreme court has recently held that, "while important as an additional safeguard against arbitrary or capricious sentencing, comparative proportionality review is

(FN10.) The record reflects that for several years prior to the murder, the defendant had committed a predicate crime, separate and distinct from the murder, of the embezzlement of church funds. The defendant testified that he first started "skimming money" out of the church's accounts in 1984. Although the evidence revealed that the

determine whether the State was permitted tc assert a new aggravating circumstance, Tenn Ann. § 39-2-203(i)(6) upon remand. Under authority of *State v. Harris,* 919 S.W.2d (Tenn.1996), this court permitted the State t introduce proof of any aggravating circumst which is otherwise legally valid. *See State* v

not constitutionally required." *See State v. Bland,* 958 S.W.2d 651, 663 (Tenn.1997), *cert. denied,* 523 U.S. 1083, 118 S.Ct. 1536, 140 L.Ed.2d 686 (1998).

Based upon the above case decisions, the appellant's constitutional challenges to Tennessee's death penalty statutes are rejected.

V. Proportionality Review [DELETED]

Conclusion

In accordance with the mandate of Tenn.Code Ann. § 39-13-206(c)(1) and the principles adopted in prior decisions of the Tennessee Supreme Court, we have considered the entire record in this cause and find that the sentence of death was not imposed in any arbitrary fashion, that the evidence supports, as previously discussed, the jury's finding of the statutory aggravating circumstances, and the jury's finding that the aggravating circumstances outweighed mitigating circumstances beyond a reasonable doubt. Tenn.Code Ann. § 39-13-206(c)(1)(A)(C). A comparative proportionality review, considering both the circumstances of the crime and the nature of the appellant, convinces us that the sentence of death is neither excessive nor disproportionate to the penalty imposed in similar cases. Likewise, we have considered the appellant's sentencing issues raised on appeal and have determined that none have merit. Accordingly, the appellant's sentence of death by electrocution is affirmed. (FN16)

CONCUR:

DAVID H. WELLES, Judge

NORMA MCGEE OGLE, Judge

(FN1.) The defendant was originally convicted of first degree murder and arson in 1989. The jury sentenced the defendant to death after finding that the State had proven the existence of two aggravating circumstances beyond a reasonable doubt: (1) the murder was especially heinous, atrocious, or cruel in that it involved depravity of mind, Tenn.Code Ann. § 39-2-203(i)(5) (1982); and (2) the murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit larceny, Tenn.Code Ann. § 39-2-203(i)(7) (1982). The defendant filed a motion for a new trial and for a new sentencing hearing. The trial court denied the motion for a new trial on the issue of guilt or innocence; however, the trial court found that it had erroneously charged to the jury the (i)(7) aggravating circumstance, and therefore, it granted a new sentencing hearing. The State appealed; we affirmed the trial court's decision in *State v. Terry,* 813 S.W.2d 420 (Tenn.1991).

(FN2.) The record reflects that Mr. Matheney was

some getaway clothes in the attic. However record is unclear why Mr. Matheney went i attic in the first place. On cross-examinatio prosecutor alluded to the fact that the defenc purposely sent him upstairs to perform some maintenance work; the defendant denied su allegation.

(FN4.) Although the defendant testified that waited between one and two hours before removing parts of the body, medical examin Charles Warren Harlan, who conducted the autopsy on the victim's body, testified that t removal of these body parts could have occi as soon as ten to fifteen minutes after the tir death.

*171 (FN5.) Because this offense occurred the 1989 amendments to the capital sentenci statute, the trial court should not have instru the jury regarding the weighing standard un language of the amended statute. In *St Brimmer,* 876 S.W.2d 75, 82 (Tenn.1994), held that the legislature intended that senten hearings must be conducted in accordance w law in effect at the time of the offense becat 1989 amendments contained no express or i retroactivity clause. However, as the instru required the jury to impose the death penalt higher standard of proof, any irregularity is harmless.

(FN6.) *See* Tenn.Code Ann. § 39-13-20((1997) ("Whenever the death penalty is imp for first degree murder and when the judgm become final in the trial court, the defendan have the right of direct appeal from the trial to the court of criminal appeals. The affirm of the conviction and the sentence of death s automatically reviewed by the Tennessee su court.").

(FN7.) Application of this pre 1989 version ((i)(5) aggravating circumstance is proper as offense was committed in 1987. *See S Brimmer,* 876 S.W.2d 75, 82 (Tenn.1994).

(FN8.) The trial court correctly deleted "tort from the instruction, as both parties concede the evidence does not support a finding that murder involved torture. *See State v. Van* 864 S.W.2d 465, 478-79 (Tenn.1993) (citin *v. Pritchett,* 621 S.W.2d 127, 139-40 (Tenr (holding that a trial court should charge only aspects of an aggravating circumstance supp by the evidence in a case)).

(FN9.) In *Houston v. Dutton,* the whole insti given to the jury regarding the "heinous, atr or cruel" aggravating circumstance was as fi "The murder was especially heinous, atrocic cruel in that it involved torture or depravity mind." *Houston,* 50 F.3d at 387. The fed Court found the trial court's jury instruction constitutional error. Similarly, in *Coe v. B* federal court again found the trial court's in

*799 958 S.W.2d 799

Court of Criminal Appeals of Tennessee, at Knoxville.

Ronald Richard **HARRIES**, Appellant
v.
STATE of Tennessee, Appellee
July 30, 1997.
Permission to Appeal Denied by Supreme Court Nov. 24, 1997.

Defendant was convicted before the Criminal Court, Sullivan County, Edgar P. Calhoun, J., of murder in the first degree, and was sentenced to death. Defendant appealed. The Supreme Court, 657 S.W.2d 414, affirmed. The Criminal Court, Lynn W. Brown, J., denied defendant's second motion for postconviction relief and appeal was taken. The Court of Criminal Appeals, Barker, J., held that: (1) when defendant is convicted of first-degree murder solely on basis of felony murder, aggravating factor that murder was committed during perpetration of felony may not be used to sustain death sentence; (2) trial court committed harmless error by allowing fact that murder was committed during perpetration of felony to serve as aggravating factor at penalty phase of capital murder case involving conviction for felony murder; (3) admission of evidence regarding nonviolent criminal acts of defendant, during penalty phase of capital murder case, did not undermine confidence that jury found as aggravating factor that defendant was convicted of violent felonies; (4) prosecutor did not urge that jury adopt invalid aggravating circumstance of felony murder in deciding whether to impose death sentence, when arguing that defendant killed victim to eliminate her as witness; and (5) mitigating factors did not outweigh aggravating factor that defendant had prior convictions for violent felonies.

Affirmed.

West Headnotes

[1] Criminal Law ⚿1144.17
110 ----
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.17 Judgment, Sentence, and Punishment.
Factual findings of postconviction trial court inherent in harmless error analysis are entitled to presumption of correctness.

[2] Criminal Law ⚿1139
110 ----
110XXIV Review
110XXIV(L) Scope of Review in General
110k1139 Additional Proofs and Trial De Novo.

[See headnote text below]

[2] Criminal Law ⚿1144.17
110 ----
110XXIV Review
110XXIV(M) Presumptions
110k1144 Facts or Proceedings Not Shown by Record
110k1144.17 Judgment, Sentence, and Punishment.
Postconviction trial court's ultimate conclusion that error was harmless is not entitled to presumption of correctness, but rather requires *de novo* review.

[3] Sentencing and Punishment ⚿1660
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1660 Dual Use of Evidence or Aggravating Factor.

(Formerly 203k357(10))
When defendant is convicted of first-degree murder solely on basis of felony murder, aggravating factor that murder was committed during perpetration of felony duplicates element of offense and may not be used to sustain death sentence; at least one of other statutory aggravaing factors must be found to support death as penalty for felony murder.

[4] Homicide ⚿343
203 ----
203X Appeal and Error
203k333 Harmless Error
203k343 Sentence.
In determining whether presence of invalid aggravating circumstance, in sentencing phase of capital murder trial, was harmless beyond reasonable doubt, courts are to consider (1) number and strength of remaining valid aggravating circumstances, (2) extent to which prosecutor emphasized invalid aggravating circumstance during closing argument, (3) evidence admitted to establish invalid aggravator, and (4) nature, quality, and strength of mitigating evidence.

[5] Homicide ⚿343
203 ----
203X Appeal and Error
203k333 Harmless Error
203k343 Sentence.
Application of felony-murder aggravating circumstance in sentencing defendant to death for first degree felony murder was error but was harmless beyond a reasonable doubt where defendant had previous convictions of felonies involving use or threat of violence, prosecutor did not emphasize the invalid aggravator in argument, there was no inadmissible evidence regarding the invalid aggravator, and mitigating evidence offered was of little consequence in lowering defendant's culpability. T.C.A. § 39-2404(i)(2) (1980).

[6] Homicide ⚿343
203 ----
203X Appeal and Error
203k333 Harmless Error
203k343 Sentence.
Admission of evidence regarding nonviolent criminal acts of defendant, during penalty phase of capital murder case, did not undermine confidence in jury's finding as aggravating circumstance that defendant had been convicted of previous violent felonies; trial court instructed that only violent felonies could serve as aggravators, and there was overwhelming proof submitted that defendant was

guilty of violent felonies. T.C.A.. § 39-2404(i)(2) (1980).

[7] Sentencing and Punishment ⚭1780(2)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) Arguments and Conduct of Counsel.

(Formerly 110k723(1))
Prosecutor did not urge that jury adopt invalid felony murder aggravating circumstance in deciding whether to impose death sentence on defendant convicted of first degree felony murder, when prosecutor argued that defendant killed victim to eliminate her as witness; perpetration of murder to eliminate witness was a separate aggravator. T.C.A. § 39-2404(g), (i)(6, 7) (1980).

[8] Sentencing and Punishment ⚭1661
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1661 Determinations Based on Multiple Factors.

(Formerly 203k357(4))

[See headnote text below]

[8] Sentencing and Punishment ⚭1705
350H ----
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1703 Other Offenses, Charges, Misconduct
350Hk1705 Nature, Degree, or Seriousness of Other Offense.

(Formerly 203k357(4))

[See headnote text below]

[8] Sentencing and Punishment ⚭1681
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1681 Killing While Committing Other Offense or in Course of Criminal Conduct.

(Formerly 203k357(4))
Factors mitigating against death penalty for first degree felony murder did not outweigh aggravating factor that defendant had committed prior violent offenses; drug addiction claim was supported by "virtually no factual proof," and was of "little, if any" value, claim that shooting was accidental was belied by testimony of witnesses, and showing of remorse came well after event.

***800** Michael J. Passino, Lassiter, Tidwell & Hildebrand, Nashville, Peter Alliman, Lee & Alliman, Madisonville, for Appellant.

John Knox Walkup, Attorney General and Reporter, Amy Tarkington, Assistant Attorney General, (On Appeal), Glenn R. Pruden, Assistant Attorney General (At Hearing), Nashville, H. Greeley Wells, Jr., District Attorney General, Blountville, for Appellee.

OPINION

BARKER, Judge.

In this capital case, appellant, Ronald Richard Harries, appeals as of right the denial by the Sullivan County Criminal Court of his second petition for post-conviction relief. He argues that the trial court erred in finding that the jury's application of the felony-murder aggravating circumstance in violation of the rule announced in *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992) , was harmless beyond a reasonable doubt. In that respect, he also contends the trial court erred by concluding that evidence of his alcohol and drug intoxication at the time of the offense was not a mitigating factor within the statute and that appellant's history of drug addiction was not sufficient mitigating evidence which would have resulted in a lesser punishment absent the application of the invalid aggravating circumstance.

After a thorough review of the record, including the trial transcript and the transcript from the hearing on appellant's first post-conviction petition, we are of the opinion that the use of the invalid felony-murder aggravating circumstance was harmless beyond a reasonable doubt. The trial court's denial of appellant's petition is affirmed.

PROCEDURAL HISTORY

Appellant was convicted in 1981 of the felony murder of Rhonda Greene, an eighteen-year-old cashier at a convenience store in Kingsport. (FN1) At the sentencing phase of the trial, the jury imposed a sentence of death, finding the presence of two statutory aggravating circumstances which were not outweighed by the mitigating evidence. Specifically, the jury found that the defendant had been previously convicted of one or more felonies, other than the present charge, which involved the use or threat of violence to the person, and the murder was committed while the defendant was engaged in committing a robbery. *See* Tenn.Code Ann. § 39-2404(i)(2), (7) (Supp.1981). On direct appeal to the supreme court, appellant's conviction and death sentence were affirmed. ***State v. Harries,*** 657 S.W.2d 414 (Tenn.1983). No permission was sought for a writ of certiorari to the United States Supreme Court.

Appellant's first post-conviction petition was filed in March of 1986. That petition raised thirty-five (35) issues, including claims of ineffective assistance of counsel at trial and on appeal; unconstitutionality of the Tennessee death penalty statute; numerous errors in voir dire and the selection of grand and petit juries in Sullivan County; inadequate ***801** evaluation of appellant's mental condition; and incorrect application of the felony-murder aggravating circumstance. Following a three-day evidentiary hearing, the trial court denied relief on the petition. On appeal, that judgment was affirmed by this Court. *Ronald Richard* ***Harries*** *v. State*, No. 833, 1990 WL 125023 (Tenn.Crim.App. at Knoxville, August 29, 1990), *perm. to appeal*

denied (Tenn.1991).

The current petition was filed September 9, 1993, alleging constitutional error in the application of the felony-murder aggravating circumstance to appellant's conviction for felony murder. *See State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992). No other grounds for relief were raised. After conducting an evidentiary hearing, the trial court issued a thorough statement of its findings of fact and conclusions of law.

The trial court found: (1) that the evidence supporting the remaining valid aggravating factor was uncontradicted and overwhelming; (2) that the prosecutor placed little emphasis on the invalid aggravator during his closing argument; and (3) that no additional evidence supporting the invalid aggravating circumstance was introduced at the sentencing phase. In evaluating the evidence offered in mitigation, the trial court found that any mitigation from appellant's drug addiction was negated by proof that appellant committed numerous crimes to support his habit. The trial court further found that evidence that appellant was under the influence of drugs and alcohol at the time of the crime was insufficient to demonstrate that he was substantially impaired. *See* Tenn.Code Ann. § 39-2404(j)(8) (Supp.1981). It also found that appellant's claims of remorse for the crime were belated and lacked sincerity and were not supported by the factual record. However, the trial court did accord some weight to that claim and also to appellant's claim that the shooting was accidental. The trial court also considered a list of ten additional mitigating factors submitted after the filing of the petition. Considering all the above, the trial court concluded that the *Middlebrooks* error was harmless beyond a reasonable doubt. *See State v. Howell,* 868 S.W.2d 238 (Tenn.1993), *cert. denied* 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994). Appellant's petition for relief was denied.

STANDARD OF REVIEW

The parties have raised the question of the proper standard of review for this Court to apply in reviewing the *Howell* harmless error analysis performed by the trial court. A review of Tennessee case law reveals that this question has not been squarely addressed. Our supreme court has had eight opportunities to consider whether application of the felony-murder aggravator in violation of *Middlebrooks* was harmless beyond a reasonable doubt. *See State v. Hines,* 919 S.W.2d 573 (Tenn.1995), *cert. denied* 519 U.S. 847, 117 S.Ct. 133, 136 L.Ed.2d 82 (1996); *State v. Walker,* 910 S.W.2d 381 (Tenn.1995), cert. denied 519 U.S. 826, 117 S.Ct. 88, 136 L.Ed.2d 45 (1996); *Hartman v. State,* 896 S.W.2d 94 (Tenn.1995); *State v. Smith,* 893 S.W.2d 908 (Tenn.1994), *cert. denied* 516 U.S. 829, 116 S.Ct. 99, 133 L.Ed.2d 53 (1995); *Barber v. State,* 889 S.W.2d 185 (Tenn.1994), *cert. denied* 513 U.S. 1184, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995); *State v. Nichols,* 877 S.W.2d 722 (Tenn.1994), *cert. denied,* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995); *State v. Cazes,* 875 S.W.2d 253 (Tenn.1994), *cert. denied* 513 U.S. 1086, 115 S.Ct. 743, 130 L.Ed.2d 644 (1995); *State v. Howell,* 868 S.W.2d 238 (Tenn.1993), *cert. denied* 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994). Procedurally, however, it has not had the opportunity to review findings of fact and conclusions of law following a trial court's *Howell* harmless error analysis. In fact, the supreme court has reviewed the issue in the context of post-conviction only twice and both times without the benefit of a post-conviction court's findings on the issue. *See Hartman,* 896 S.W.2d at 96; *Barber,* 889 S.W.2d at 186.

This Court has rendered decisions in capital cases in this procedural posture at least twice. *See Tommy L. King v. State,* No. 01C01-9512-CC-00415, 1997 WL 59464 (Tenn.Crim.App. at Nashville, February 12, 1997), *appeal granted* (Tenn. July 7, 1997); *Michael J. Boyd v. State,* No. 02C01-9406-CR-00131, 1996 WL 75351 (Tenn.Crim.App. at Jackson, February 21, 1996), *appeal granted* (Tenn. November 25, 1996). In *Boyd,* a panel of this Court discussed the trial court's analysis of the *Howell* issue, but did not explicitly rely upon the trial court's findings or discuss the standard of review. The trial court's findings were not addressed in *King*.

We are mindful of the well-established standard of review generally applicable to denials of post-conviction petitions. The trial court's findings of fact and conclusions of law are given the weight of a jury verdict and accorded a presumption of correctness. This Court is bound by those factual findings unless the evidence within the record preponderates against the judgment. *See, e.g., Davis v. State,* 912 S.W.2d 689, 697 (Tenn.1995); *Cooper v. State,* 849 S.W.2d 744, 746 (Tenn.1993); *Adkins v. State,* 911 S.W.2d 334, 354 (Tenn.Crim.App.1994); *Alley v. State,* 882 S.W.2d 810, 817 (Tenn.Crim.App.1994); *Rhoden v. State,* 816 S.W.2d 56, 59-60 (Tenn.Crim.App.1991); *Bankston v. State,* 815 S.W.2d 213, 215 (Tenn.Crim.App.1991); *Black v. State,* 794 S.W.2d 752, 755 (Tenn.Crim.App.1990); *Teague v. State,* 772 S.W.2d 932, 933-34 (Tenn.Crim.App.1988); *Brooks v. State,* 756 S.W.2d 288, 289 (Tenn.Crim.App.1988); *Vermilye v. State,* 754 S.W.2d 82, 84 (Tenn.Crim.App.1987); *State v. Buford,* 666 S.W.2d 473, 475 (Tenn.Crim.App.1983); *Clenny v. State,* 576 S.W.2d 12, 14 (Tenn.Crim.App.1978), *cert. denied* 441 U.S. 947, 99 S.Ct. 2170, 60 L.Ed.2d 1050 (1979); *Long v. State,* 510 S.W.2d 83, 86 (Tenn.Crim.App.1974). The supreme court recently applied this standard of review in a capital case when reviewing a lower court's determination on the ineffective assistance of counsel. *Goad v. State,* 938 S.W.2d 363, 368-69 (Tenn.1996).

[1] Applying these principles, we conclude that the factual findings of the trial court inherent in a harmless error analysis are entitled to a presumption of correctness. For example, the emphasis that the prosecutor placed on the invalid aggravating circumstance in closing argument, as well as the number of remaining valid aggravating circumstances, should be considered factual findings. Determinations on the quality of mitigating evidence are also entitled to the presumption. *See Parker v. Dugger,* 498 U.S. 308, 316-19, 111 S.Ct. 731, 737-38, 112 L.Ed.2d 812 (1991) (concluding that a state appellate court's determination that the trial judge found no mitigating circumstances in a capital trial is an issue of historical fact in habeas corpus proceedings and

entitled to presumption of correctness if fairly supported by the record).

[2] However, a trial court's ultimate conclusion of harmlessness is not entitled to a presumption of correctness, but rather requires a *de novo* review. *See Yates v. Evatt,* 500 U.S. 391, 405-06, 111 S.Ct. 1884, 1894, 114 L.Ed.2d 432 (1991) (evaluating the harmlessness of a constitutional error requires consideration of the entire record) (citations omitted); *Arizona v. Fulminante,* 499 U.S. 279, 294-96, 111 S.Ct. 1246, 1257, 113 L.Ed.2d 302 (1991) (stating that the Supreme Court has power to review the record *de novo* to determine error's harmlessness). This is due, in part, because the issue of harmlessness is a mixed question of law and fact. *See Deputy v. Taylor,* 19 F.3d 1485, 1496 (3d Cir.), *cert. denied* 512 U.S. 1230, 114 S.Ct. 2730, 129 L.Ed.2d 853 (1994) (finding that state court's conclusion of harmlessness is a mixed question of law and fact, not entitled to a presumption of correctness); *Suniga v. Bunnell,* 998 F.2d 664, 667 (9th Cir.1993) (determination by state appellate court that instructional error was harmless is mixed question of law and fact to be reviewed *de novo*). *See also Cremeans v. Chapleau,* 62 F.3d 167, 169 (6th Cir.1995), *cert. denied* 516 U.S. 1096, 116 S.Ct. 822, 133 L.Ed.2d 765 (1996) (finding that mixed question of law and fact is not entitled to deference).

Furthermore, it is impossible to determine the impact of an error and evaluate its harmlessness without evaluating it in the context of the entire record. Our rules of appellate procedure require as much: "A final judgment from which relief is available and otherwise appropriate shall not be set aside unless, *considering the whole record,* error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process." *See* Tenn. R.App. P. 36(b) (emphasis added). Moreover, *Howell* directs the reviewing ***803** court to examine the entire record for factors which potentially influenced the jury's decision. 868 S.W.2d at 260. This is necessary to satisfy the constitutional demand of individualized sentencing considerations in capital cases. *Stringer v. Black,* 503 U.S. 222, 229-30, 112 S.Ct. 1130, 1136, 117 L.Ed.2d 367 (1992).

In reaching these conclusions, we are guided by the approach used in federal courts for habeas corpus proceedings. (FN2) In such proceedings, factual findings of the state courts are entitled to a presumption of correctness, just as we grant deference to the post-conviction court. *See* 28 U.S.C. § 2254(e)(1) (Supp.1997). This deference is equally applicable to findings of a state appellate court. *Sumner v. Mata,* 449 U.S. 539, 546-48, 101 S.Ct. 764, 769, 66 L.Ed.2d 722 (1981). However, when determining the harmlessness of an error, review of the record should be *de novo* with no presumption of correctness. *See Miller v. Fenton,* 474 U.S. 104, 110-12, 106 S.Ct. 445, 450, 88 L.Ed.2d 405 (1985) (concluding that ultimate question of admissibility of confession is not factual determination entitled to presumption of correctness). It is within this context that we review appellant's assigned errors.

MIDDLEBROOKS ERROR

Appellant argues that his death sentence is infirm as a result of the jury's application of the felony-murder aggravating circumstance to his conviction for first degree felony murder. He contends that such error cannot be considered harmless in light of the substantial mitigating evidence presented at trial and the presence of only one valid aggravating circumstance. We disagree.

[3] When a defendant is convicted of first degree murder solely on the basis of felony murder, use of the aggravating circumstance that the murder was committed during the perpetration of a felony fails to sufficiently narrow the class of death-eligible murderers. *State v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992). Because use of this aggravating circumstance in a felony-murder conviction to assess the death penalty duplicates the elements of the offense, it violates the Tennessee Constitution. *Id.* Thus, in order to support death as a penalty for the crime of felony murder, a finding of at least one of the other statutory aggravating circumstances is necessary. *Id* at 346-47. This rule has been held to apply retroactively. *Barber v. State,* 889 S.W.2d 185, 186 (Tenn.1994), *cert. denied* 513 U.S. 1184, 115 S.Ct. 1177, 130 L.Ed.2d 1129 (1995). (FN3)

It is apparent on the face of the record that a *Middlebrooks* error occurred in appellant's case. Appellant shot and killed Rhonda Greene during the course of a robbery of the Jiffy Market where she worked. As a result, the jury found him guilty of first degree felony murder. The jury's application of the felony-murder aggravating circumstance was duplicative of the elements of the crime. As a result, this circumstance cannot be used to support appellant's death sentence.

[4] Such error, however, does not automatically mandate a reversal of appellant's death sentence or require a new sentencing hearing. This Court must review the record of the evidence at trial and evaluate whether the error is harmless beyond a reasonable doubt. *See State v. Howell,* 868 S.W.2d 238, 259 (Tenn.1993), *cert. denied* 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994). To perform that analysis, our supreme court delineated certain factors which potentially influence the sentence imposed at trial. *Id* at 260. These relevant factors include: (1) the number and strength of the remaining valid aggravating circumstances; (2) the extent to which the prosecutor emphasized the invalid aggravating circumstance during closing ***804** argument; (3) the evidence admitted to establish the invalid aggravator; and (4) the nature, quality, and strength of the mitigating evidence. *Id* at 260-61. If the reviewing court determines that the jury would have imposed the same sentence had it given no weight to the invalid aggravating circumstance, the error is harmless and the sentence may be affirmed. *Id* at 262.

HOWELL ANALYSIS

A. Remaining Aggravators

[5] At appellant's trial, the jury found one other aggravating circumstance in addition to the felony-murder aggravator: appellant had previous convictions of felonies involving the use or threat of violence to the person. (FN4) Tenn.Code Ann. §

39-2404(i)(2) (Supp.1981). In support of this aggravating circumstance at the sentencing phase, the State introduced testimony and certified copies of convictions to substantiate three previous violent felonies from the state of Ohio: robbery, armed robbery and kidnapping. (FN5)

Although the number of valid aggravators is relevant, the crucial inquiry is the qualitative nature of the aggravating circumstance, its substance and persuasiveness, and the quantum of proof supporting it. *Howell,* 868 S.W.2d at 261. In this respect, our supreme court has determined that the prior violent felony aggravator is more qualitatively persuasive and objectively reliable than others. *Id.* Moreover, the influence of this aggravating circumstance increases if there is proof of multiple felony convictions. *Id. See also State v. Nichols,* 877 S.W.2d 722, 738 (Tenn.1994), *cert. denied* 513 U.S. 1114, 115 S.Ct. 909, 130 L.Ed.2d 791 (1995).

Appellant's previous robbery conviction arose from the hold-up of a dairy store in Cuyahoga Falls, Ohio. The victim, an eighteen-year-old clerk at the store, testified that appellant entered the store and demanded money. He had his hand in his pocket and she was unsure if he was armed. (FN6) The armed robbery conviction and kidnapping arose in Canton, Ohio. Appellant was armed and entered a restaurant. As he was robbing a waitress, a police cruiser drove into the restaurant parking lot. Appellant took the waitress hostage to make his escape. He and his accomplice held her for ten hours and then released her. The victim testified at trial, stating that appellant threatened her life more than once while she was being held, but that she was not physically harmed. She added that appellant did not want to release her and his accomplice eventually convinced him to do so. Appellant pled guilty to all three crimes and served approximately seven and one half years in an Ohio state prison. (FN7)

The record supports the trial court's finding that the remaining aggravating circumstance in appellant's case was supported by uncontradicted and overwhelming proof. The appellant testified to the substance of these crimes during the guilt phase, the State introduced certified copies of the convictions, and the victims of the crimes testified at the sentencing phase of appellant's trial. Due to the objective nature of this aggravating circumstance and the quantum of proof supporting it, we believe it significantly influenced the jury's verdict.

[6] Appellant argues that the admission of non-violent criminal acts during the penalty phase of the trial undermines confidence in the jury's determination on the previous violent felony aggravating circumstance. At the sentencing phase, the State introduced proof of convictions for malicious breaking and mail fraud. The circumstances surrounding ***805** those offenses demonstrate that they did not involve violence or the threat of violence. A panel of this Court recently held that the admission of non-violent felonies at the penalty stage of a capital trial does not necessarily require a new sentencing hearing, but may be considered harmless error. *State v. Perry A. Cribbs,* No. 02C01-9508-CR-00211, 1997 WL 61507 (Tenn.Crim.App. at Jackson, February 14, 1997). *See also State v. Campbell,* 664 S.W.2d 281, 284 (Tenn.1984), *cert. denied* 469 U.S. 920, 105 S.Ct. 302, 83 L.Ed.2d 236 (1984). *But see State v. Johnson,* 661 S.W.2d 854 (Tenn.1983) (determining that admission of non-violent felonies in support of the aggravating circumstance was so prejudicial that it required a new sentencing hearing). In holding that any error at appellant's trial in this respect was harmless, we concur in the conclusion of *Cribbs* that the rationale of *Johnson* is inapplicable in light of subsequent United States Supreme Court holdings. *See Clemons v. Mississippi,* 494 U.S. 738, 110 S.Ct. 1441, 108 L.Ed.2d 725 (1990) (permitting harmless error review when jury has relied on invalid aggravating circumstance in imposing death penalty).

We are confident in the jury's finding on this aggravating circumstance in light of the substantial proof offered to support it. Moreover, the trial court instructed the jury to only consider the robbery, armed robbery and kidnapping convictions when evaluating the aggravating circumstance. It specifically directed that no other previous convictions could be considered on the aggravator. (FN8) In light of these attendant facts and the overwhelming proof submitted on the prior violent felonies, we do not find that the introduction of these two non-violent crimes affected the jury's verdict. Any error in their admission was harmless. (FN9)

B. Prosecution's Closing Argument

[7] We next consider the prosecutor's closing argument and the extent to which it emphasized the invalid felony-murder aggravating circumstance. Our review of the record does not indicate that the district attorney placed any undue emphasis on this aggravating circumstance. The State sought to prove six statutory aggravating circumstances. The prosecutor's argument walked the jury through each of the aggravators and also addressed the mitigating circumstances. The prosecutor referred to the felony-murder aggravator only twice.

If any emphasis can be detected in the argument, it was devoted to the "witness killing" aggravator. Tenn.Code Ann. § 39-2404(i)(6) (Supp.1981) ("the murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or prosecution of the defendant or another"). This theory was a substantial component to the State's proof, beginning at the guilt phase of the trial. In response to questions by the prosecution, appellant acknowledged that the victims of his previous violent crimes identified him as the perpetrator. In light of that, the State implied that appellant intended to leave no witnesses to the robbery of the Jiffy Market to reduce the possibility of identification. That theory was additionally supported by proof that the appellant fired upon the other cashier at the market and circumstantial proof that appellant believed Greene was the only clerk in the store at the time of the robbery. *See State v. Harries,* 657 S.W.2d 414, 417 (Tenn.1983).

Appellant acknowledges that only a small portion of the State's argument focused on the felony-murder aggravating circumstance, but argues that a substantial portion of the argument was devoted to the "witness elimination policy of the felony murder aggravator." He attempts to equate the felony-

murder aggravator with the witness-elimination aggravator. (FN10) *Compare* Tenn.Code Ann. *806 § 39-2404(i)(7) (Supp.1981) *and* Tenn.Code Ann. § 39-2404(i)(6) (Supp.1981). This Court has previously rejected such a contention. *State v. Leroy Hall, Jr.,* No. 03C01-9303-CR-00065, 1996 WL 740822 (Tenn.Crim.App. at Knoxville, December 30, 1996). Similarly, claims that use of these two aggravators constitute double weighing have also been rejected. *State v. James Blanton,* No. 01C01-9307-CC-00218, 1996 WL 219609 (Tenn.Crim.App. at Nashville, April 30, 1997).

The legislature's delineation of these two separate aggravators is sufficient to rebut appellant's claim. A finding of either can be used to support the imposition of the death penalty. *See* Tenn.Code Ann. § 39-2404(g) (Supp.1981). In addition, the plain language of these aggravating circumstances signify that they seek to target two different groups of murderers. The witness-elimination aggravating circumstance, Tennessee Code Annotated section 39-2404(i)(6), enhances the punishment when it can be proven that at least one motive for the killing was the threat of defendant's apprehension. *State v. Smith,* 868 S.W.2d 561, 580 (Tenn.1993), *cert. denied,* 513 U.S. 960, 115 S.Ct. 417, 130 L.Ed.2d 333 (1994). In contrast, the felony-murder aggravator is used to target those murderers who cause the death of the victim while committing, attempting to commit or fleeing from certain enumerated felonies. Tenn.Code Ann. § 39-2404(i)(7) (Supp.1981). As such, different proof is necessary to support the imposition of each. Although it may be argued that in many felony murders the purpose is to eliminate witnesses, *State v. Terry,* 813 S.W.2d 420, 423 (Tenn.1991), such a blanket assertion does not apply to every felony murder. It cannot be said that every murder committed during the course of a felony is for the purpose of eliminating witnesses. *State v. Teresa Deion Smith Harris,* No. 02C01-9412-CC-00265, 1996 WL 654335 (Tenn.Crim.App. at Jackson, November 12, 1996). Each case must stand on its individual factual circumstances. Appellant's argument on this issue fails.

C. Evidence Supporting Invalid Circumstance

Also relevant to our determination is the evidence which was admitted to establish the invalid aggravating circumstance. We must consider whether an invalid aggravator was established by evidence that was materially inaccurate or admissible only to support the invalid aggravator, or whether the evidence was otherwise admissible in the guilt or sentencing phases. *Howell,* 868 S.W.2d at 261. Evidence that the murder was committed during the commission of a felony came during the State's case-in-chief at the guilt phase and resulted in appellant's conviction of felony murder. No additional evidence to support the invalid aggravator was introduced in the sentencing phase of the trial. An aggravating factor which duplicates the elements of the underlying crime, as in appellant's case, has less relative tendency to prejudicially affect the sentence imposed. *Id.* Appellant conceded this point at the post-conviction hearing.

D. Mitigation Evidence

[8] Finally, we must consider all the relevant mitigating evidence, including its nature, strength, and quality. *Howell,* 868 S.W.2d at 262. Appellant's case is replete with information offered as mitigation, primarily pertaining to his history of drug and alcohol abuse and addiction. Indeed, at trial, drug and alcohol abuse was the primary theory of appellant's defense. Appellant contended that he was high on drugs at the time of the offense and unaware of his actions.

Appellant testified during the guilt phase of the trial. In addition to testimony of his previous crimes and periods of confinement, appellant detailed his use of drugs and alcohol during his teenage years that continued throughout his adult life. He stated that he unsuccessfully tried to overcome his drug habit while incarcerated. (FN11) In addition to alcohol, appellant provided detailed descriptions of the amount and types of drugs he was using in the days before and the day of *807 the shooting. Appellant's convicted accomplice and alleged drug supplier, Charles Wade Stapleton, attested to appellant's use of drugs and alcohol before the crime. (FN12)

Furthermore, appellant testified that he did not intend to kill Greene and that the shooting was accidental. He explained that the gun was cocked when he entered the store. As he pointed the gun at Greene, he claimed that another patron in the store startled and jostled him, causing the gun to discharge. Another aspect of appellant's testimony intended to be mitigating was that the gun did not belong to him. Appellant claimed that he obtained the gun from Ralph Page, a mutual friend of appellant and Stapleton, and that Page was the moving force behind the robbery. Appellant concluded his testimony by expressing remorse for the crime.

Appellant did not testify at the sentencing portion of the trial, relying on his earlier testimony as mitigation. Instead he introduced documentary evidence in mitigation at the sentencing phase. A report from Dr. Herbert Bockian, a psychiatrist who evaluated appellant's competency to stand trial and screened him for drug use, was read into the record. That drug screen, performed the week of the trial, revealed a trace amount of barbiturates in appellant's blood. The test was performed in response to appellant's claims that he was obtaining and taking drugs while confined. Apparently, the report was intended to corroborate appellant's testimony of his drug addiction.

A report from the Southern Ohio Correctional Facility was also introduced. The 1977 report reflected that appellant possessed a syringe and one pill of Creptodigin while in jail. Prison guards also observed fresh needle marks on appellant's arms at that time. Again, this was intended to corroborate appellant's testimony of drug abuse and addiction, specifically his claims that it continued throughout his confinement in penal institutions.

We view such evidence as having little, if any, value in lessening appellant's culpability in the eyes of the jury. Most of the evidence depicted an undesirable lifestyle, painting a picture of a man who "caroused" at night, slept during the day, and failed to maintain employment. In contrast, there

was absolutely no evidence introduced in support of appellant's good character. *State v. Howell,* 868 S.W.2d 238, 262 (Tenn.1993), *cert. denied* 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994).

The jury obviously gave little weight to appellant's testimony that he was "spaced out" or high on drugs at the time of the crime. Appellant possessed a clear recollection of the events of that evening. Proof reflected that appellant and his accomplice drove around for some time before the crime to find a good place to rob. Appellant entered the store and waited for another customer to leave before he committed the crime. In addition, he had no difficulty fleeing from the crime scene, meeting his accomplice at an appointed place, and later counting the money and separating it from food stamps. After counting the money, he buried the money bags behind Stapleton's house and later that night gave the food stamps to Stapleton's niece. Those activities indicate a keen appreciation for the wrongfulness of his conduct. Moreover, the day following the crime, appellant, Stapleton, and Page traveled to North Carolina to dispose of the gun used in the murder. Following that trip, they had planned an elaborate scheme for the three of them to rendezvous in Florida.

The appellant argues that the trial court erred by finding the proof insufficient to sustain a determination that appellant was substantially impaired. Tenn.Code Ann. § 39-2404(j)(8) (Supp.1981). As stated, we find the trial court's conclusion on substantial impairment supported by the record. However, he argues that even if the proof did not satisfy that statutory mitigator, the information could still have been considered in mitigation. *See* Tenn.Code Ann. § 39-2404(j) (Supp.1981) (mitigation evidence not limited ***808** to statutory mitigating circumstances). (FN13) *See also Lockett v. Ohio,* 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (holding that evidence at the sentencing phase cannot be limited to statutory mitigating circumstances). Contrary to appellant's assertion, the trial court did not find that the evidence could not be considered in mitigation. Rather, it gave it little weight in mitigation when considering it in light of the quality of the proof supporting the valid aggravating circumstance. *Howell,* 868 S.W.2d at 262. Even though the evidence may have been considered by the jury, its questionable value was necessarily considered by the trial court in weighing the harmlessness of the *Middlebrooks* error. *Hartman v. State,* 896 S.W.2d 94, 104 (Tenn.1995) (concluding that credibility of witness is relevant when weighing harmlessness of invalid aggravating factor).

Moreover, the trial court found that evidence of appellant's drug addiction was not persuasive in mitigation; there was virtually no factual proof offered in support of that claim. There was no medical evidence that appellant was addicted to drugs or alcohol, nor did the psychological evaluations indicate that appellant was addicted. His testimony on the issue, corroborated only by accomplice testimony and thin documentary evidence from four years before the crime, is hardly convincing or significant in light of the other proof.

The trial court also found by the appellant committing violent crimes to support a drug habit, any mitigation from which the appellant might benefit was negated. Appellant characterizes this conclusion as rank conjecture. Again, it was the trial court's duty to consider the quality and persuasiveness of the mitigating evidence in the weighing of harmless error. *Howell,* 868 S.W.2d at 262.

Other mitigation evidence offered by appellant lacked credibility. Appellant never disputed that he shot Rhonda Greene, but claimed that it was accidental. However, this was contradicted by other witnesses. Appellant claimed that Scott Fletcher, another store patron, startled him and jostled his arm causing the gun to fire. In contrast, Fletcher's statements to law enforcement and unequivocal testimony at trial reflected that he was standing outside the store in the parking lot at his car when he heard the gunshots. Additionally, the surviving store cashier testified that she saw Fletcher exit the store and moments later heard the gunshot.

Finally, appellant's remorse for Greene's death was of little value in mitigation. As the post-conviction trial court noted, this sorrow developed well after the crime was committed. After shooting Greene, appellant exhibited no remorse. He did not attempt to aid the victim, but instead fired a shot at the other clerk. He then repeatedly demanded the money from her and did not permit her to seek medical assistance for Greene.

We are aware that appellant has offered evidence throughout his post-conviction proceedings that he suffers from brain damage. He argues that this should be considered in mitigation of his crime. However, we note that such evidence was not before the jury and could not have played a role in its decision. In addition, the evidence of brain damage primarily consists of a letter from a New York psychiatrist, (FN14) dated five years after the crime. Although appellant has been evaluated on numerous occasions by both psychologists and psychiatrists, (FN15) the record before us ***809** does not indicate that other doctors have reached a similar conclusion. (FN16)

Appellant broadly attacks the *Howell* harmless error analysis because the jury is not required to specify the mitigating circumstances it considered. He contends that it is virtually impossible to determine harmlessness without knowing which facts the jury considered in mitigation. Our supreme court, acknowledging that juries do not specify mitigating circumstances, has nevertheless found that a harmless error analysis can be performed. The court quoted with approval from *Clemons v. Mississippi,* 494 U.S. 738, 756, 110 S.Ct. 1441, 1452, 108 L.Ed.2d 725 (1990):

> Nor are we impressed with the claim that without written jury findings concerning mitigating circumstances appellate courts cannot perform their proper role. In *Fonzeo* and *Proffit,* we upheld the Florida death penalty scheme permitting a trial judge to override a jury's recommendation of life, even though there were no written jury findings. An appellate court also is able adequately to evaluate any evidence relating to mitigating factors without the assistance of written

jury findings.

Howell, 868 S.W.2d at 260. Appellant's argument is without merit.

Appellant argues that his death sentence cannot be upheld in light of the supreme court's ruling in *State v. Walker*, 910 S.W.2d 381 (Tenn.1995). In *Walker*, a direct appeal of a death sentence, the court was unable to find the *Middlebrooks* error harmless where the only valid remaining aggravator was a previous violent felony conviction. *Id* at 398. However, *Walker* is readily distinguishable from appellant's case. At the Walker trial, the remaining aggravator was supported by only one voluntary manslaughter conviction. *Cf. Michael J. Boyd v. State*, No. 02C01-9406-CR-00131, 1996 WL 75351 (Tenn.Crim.App. at Jackson, February 21, 1996), *appeal granted* (Tenn. November 25, 1996) (finding in review of post-conviction proceeding that use of felony-murder aggravating circumstance harmless beyond a reasonable doubt where remaining valid aggravator, prior violent felonies, was supported by one conviction for second degree murder). Here, however, the aggravator at appellant's trial was supported by proof of three previous violent felonies and a portion of that proof was appellant's own testimony. Therefore, the nature and the quantum of proof supporting the aggravator was far more substantial than in *Walker*.

In fulfilling our duty to evaluate the mitigating evidence, we find that the evidence proffered was of little consequence in lowering appellant's culpability. Appellant admitted shooting the victim and his claims in mitigation did little to ameliorate his liability for the crime. On two separate occasions, the supreme court has considered similar mitigating evidence presented on behalf of defendants and found it insufficient to require a new sentencing hearing in the context of harmless error. *See State v. Hines*, 919 S.W.2d 573, 584 (Tenn.1995); *Howell*, 868 S.W.2d at 262. Considering the substantial proof presented on the remaining valid aggravator and the nature of that proof, coupled with the prosecutor's argument and absence of inadmissible proof of the invalid aggravator, we find that the jury would have imposed the death penalty had it not considered the invalid felony-murder aggravating circumstance.

CONCLUSION

The trial court's findings of fact on the individual factors considered in *Howell* are fully supported by the record. Moreover, our *de novo* review indicates that the error in applying the felony-murder aggravator to appellant's case was harmless beyond a reasonable ***810.** doubt. The judgment of the trial court dismissing the appellant's post-conviction petition is affirmed. Unless stayed by a court of competent jurisdiction, the appellant's sentence of death by electrocution shall be carried out on February 10, 1998.

WADE and CURWOOD WITT, JJ., concur.

(FN1.) A full recitation of the factual circumstances surrounding the offense is contained in the supreme court's opinion in appellant's case on direct appeal. *State v. Harries*, 657 S.W.2d 414 (Tenn.1983).

(FN2.) This Court has previously held that post-conviction review is comparable in scope to federal habeas corpus review. *Luttrell v. State*, 644 S.W.2d 408, 409 (Tenn.Crim.App.1982).

(FN3.) Ordinarily, the statute of limitations would have expired on July 1, 1989, thereby preventing this late-filed post-conviction petition. Tenn.Code Ann. § 40-30-102 (repealed 1995). *See also State v. Masucci*, 754 S.W.2d 90, 91 (Tenn.Crim.App.1988). However, with regard to affording appellant the right to litigate the *Middlebrooks* issue, his present petition was timely under the rule announced in *Burford v. State*, 845 S.W.2d 204 (Tenn.1992).

(FN4.) At trial, appellant conceded the presence of these two aggravators in his closing argument.

(FN5.) Appellant testified about his previous convictions during his direct testimony at the guilt phase of the trial.

(FN6.) The characterization of this crime as a violent felony used to support the aggravating circumstance was challenged on direct appeal. The victim's testimony was that she was placed in fear because appellant's hand was in his pocket in a manner indicating that he had a weapon. Considering that fact, our supreme court found that it was not error to admit the conviction. *Harries*, 657 S.W.2d at 421.

(FN7.) Upon release, appellant was immediately incarcerated in federal prison for mail fraud. Appellant committed the instant offense less than two months after his December 12, 1980, release from confinement.

(FN8.) As a corollary, the trial court further instructed the jury that all of appellant's previous convictions could be considered to rebut any claim or potential claim in mitigation that appellant had no significant history of prior criminal activity. *See* Tenn.Code Ann. § 39-2404(c) (Supp.1981).

(FN9.) Introduction of the mail fraud conviction was challenged on direct appeal. The supreme court found that its admission was harmless error. *Harries*, 657 S.W.2d at 421-22.

(FN10.) Although argued by the State, the jury did not find the witness-elimination aggravating circumstance.

(FN11.) Appellant testified that when he was nearing release from prison, he sought methadone treatment from the prison doctor. This claim was not corroborated by any other evidence in the record.

(FN12.) The State contended that this was in exchange for favorable testimony appellant had already given on behalf of Stapleton at his trial.

(FN13.) Appellant's brief cites "Section 39-2404(j)(9)" which allegedly "provided that the jury could consider 'any other evidence you find to be mitigating circumstances.' " We note that subsection (j)(9) was not a part of the 1981 statute.

However, the trial court's instructions to the jury advised that the jury could consider any facts or circumstances in mitigation.

(FN14.) This evaluation was the basis of a 1984 ruling by a federal district court that appellant was incompetent to waive his post-conviction rights and proceed to execution. *See Groseclose ex rel. Harries v. Dutton,* 594 F.Supp. 949, 956 (M.D.Tenn.1984).

(FN15.) Appellant's competency to stand trial was evaluated twice before the trial, as well as his ability to appreciate the wrongfulness of his conduct at the time of the offense. No personality disorders or defects were discovered. We also note that, according to testimony from appellant's trial counsel, appellant was vehemently opposed to pursuing an insanity defense and instructed his attorneys not to consider it. Moreover, appellant's competency to proceed in the instant proceeding was evaluated at the trial court level.

***810_** (FN16.) We acknowledge that a report from a boys' home may have alluded to brain damage. However, this testing was done in 1962 and testimony at the first post-conviction hearing attacked the credibility of this finding.

*797 885 S.W.2d 797

Supreme Court of Tennessee,
at Nashville.

STATE of Tennessee, Appellee,
v.
Roosevelt BIGBEE, Appellant.
Oct. 3, 1994.

Defendant was convicted in the Criminal Court, Sumner County, Fred A. Kelly, III, J., of felony murder during attempted robbery and was sentenced to death. Defendant appealed. The Supreme Court, Anderson, J., held that: (1) informant's testimony sufficiently corroborated testimony by accomplice; (2) defendant failed to establish that juror was racially biased; (3) appeal to jury's sympathies during guilt phase was not so inflammatory as to require reversal; (4) prosecutorial misconduct during penalty phase required reversal of sentence; and (5) state's use of felony murder as aggravating circumstance during penalty phase violated state constitution.

Conviction affirmed, sentence reversed, and remanded for resentencing.

Reid, J., filed concurring opinion.

O'Brien, C.J. and Drowota, J., filed concurring and dissenting opinions.

West Headnotes

[1] Criminal Law ⚿511.1(9)
110 ----
110XVII Evidence
110XVII(S) Testimony of Accomplices and Codefendants
110XVII(S)2 Corroboration
110k511 Sufficiency
110k511.1 In General
110k511.1(6) Particular Offenses
110k511.1(9) Larceny; Burglary; Robbery; Receiving Stolen Goods.
Testimony of informant sufficiently corroborated testimony of accomplice implicating defendant in murder during robbery attempt; informant testified that he overheard defendant's conversation in jail in which defendant described how he shot victim, although jailer testified that layout of jail would have precluded defendant from having alleged conversation.

[2] Criminal Law ⚿785(4)
110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k785 Credibility of Witnesses
110k785(4) Police Officers, Detectives, and Informers.
Trial court was not required to instruct jury to consider testimony of informer or accomplice with greater care and caution than that used to examine testimony of other witnesses; jury already had been informed that conviction could not be based upon unsupported testimony of accomplice, and that jury was to reconcile conflicting testimony of witnesses in light of presumption that all witnesses were truthful.

[3] Criminal Law ⚿788
110 ----
110XX Trial
110XX(G) Instructions: Necessity, Requisites, and Sufficiency
110k788 Failure to Call Witness or Produce Evidence.
Missing witness instruction was not required for accomplice, in light of facts that accomplice was equally available to either side as witness, and that nothing in record indicated relationship between state and accomplice which would naturally incline accomplice to testify favorably for state.

[4] Jury ⚿97(1)
230 ----
230V Competency of Jurors, Challenges, and Objections
230k97 Bias and Prejudice
230k97(1) In General.
Defendant failed to establish that juror had racial bias or prejudice against defendant in violation of defendant's right to impartial jury; juror expressly stated he could be impartial during voir dire, but juror appeared at court house wearing shirt displaying "southern justice" which was name of juror's band, juror allegedly gestured as if pulling electric switch at time that death sentence was announced, and juror hugged victim's family in hallway of court house after trial. Const. Art. 1, §§ 8, 9; U.S.C.A. Const.Amends. 6, 14.

[5] Jury ⚿132
230 ----
230V Competency of Jurors, Challenges, and Objections
230k124 Challenges for Cause
230k132 Evidence.
Burden is on defendant to show that juror is in some way biased or prejudiced if juror is not legally disqualified or there is no inherent prejudice.

[6] Criminal Law ⚿1043(2)
110 ----
110XXIV Review
110XXIV(E) Presentation and Reservation in Lower Court of Grounds of Review
110XXIV(E)1 In General
110k1043 Scope and Effect of Objection
110k1043(2) Necessity of Specific Objection.
Defendant failed to establish claim of deceptive interrogation by informant, absent objection or motion at trial to focus proof and fully delineate critical issue of whether informant was acting as agent for state.

[7] Criminal Law ⚿1169.1(10)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1169 Admission of Evidence
110k1169.1 In General
110k1169.1(10) Documentary and Demonstrative Evidence.
Admission of irrelevant evidence of loaded pistol and holster found under backseat of patrol car in which defendant and codefendant were transferred from jail was harmless error, in light of defense attorney's wide latitude in demonstrating how difficult it would have been for either defendant or

codefendant to smuggle loaded gun out of jail. Rules Crim.Proc., Rule 52(a).

[8] Criminal Law ⚿404.65
110 ----
110XVII Evidence
110XVII(K) Demonstrative Evidence
110k404.35 Particular Objects
110k404.65 Weapons and Related Objects.
Probative value of revolver's admission into evidence was not substantially outweighed by its prejudicial effect even though state's firearms expert testified that bullets found at scene of robbery and murder could not have come from revolver admitted at trial, in light of evidence that another gun of same caliber was used in crime but not fired. Rules of Evid., Rule 403.

[9] Criminal Law ⚿438(8)
110 ----
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(8) Special Types of Photographs; Enlargements, Motion and Sound Pictures, X-Rays.
Admissibility of videotapes of crime scene is within sound discretion of trial judge whose ruling will not be overturned without clear showing of abuse of discretion.

[10] Criminal Law ⚿438(8)
110 ----
110XVII Evidence
110XVII(P) Documentary Evidence
110k431 Private Writings and Publications
110k438 Photographs and Other Pictures
110k438(8) Special Types of Photographs; Enlargements, Motion and Sound Pictures, X-Rays.
Trial court did not abuse its discretion in allowing videotape of crime scene to be played at trial even though portion of tape showing victim's body and face was unpleasant and showed postmortem lividity and rigor mortis. Rules of Evid., Rule 403.

[11] Criminal Law ⚿700(2.1)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
110k700(2) Disclosure or Suppression of Information
110k700(2.1) In General.
In order to prove *Brady* violation, defendant must establish that prosecutor suppressed discoverable information, that information was of favorable character for defendants, and that suppressed information was material.

[12] Criminal Law ⚿700(2.1)
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k700 Rights and Duties of Prosecuting Attorney
110k700(2) Disclosure or Suppression of Information
110k700(2.1) In General.
No *Brady* violation occurred from state's failure to disclose existence of fingerprints and footprint which did not implicate defendant, absent any evidence of intentional withholding of exculpatory evidence, and in light of fact that evidence at issue was brought out at trial; state did ***797** not disclose existence of fingerprints and footprints due to misunderstanding between state and defense lawyers.

[13] Criminal Law ⚿726
110 ----
110XX Trial
110XX(E) Arguments and Conduct of Counsel
110k726 Responsive Statements and Remarks.
Prosecutor's statement in argument that defense counsel had known of lack of fingerprints matching defendant for years was fair rebuttal to defense counsel's remarks suggesting that defense counsel had not been told ahead of time that prints excluded defendant.

[14] Homicide ⚿169(1)
203 ----
203VII Evidence
203VII(B) Admissibility in General
203k169 Circumstances Preceding Act
203k169(1) In General.
Testimony of murder victim's daughter was relevant to show that daughter had spoken with her father by telephone at specific time on night of his death.

[15] Homicide ⚿338(1)
203 ----
203X Appeal and Error
203k333 Harmless Error
203k338 Admission of Evidence
203k338(1) In General.
Error, if any, from admission of potentially irrelevant testimony of store manager about employee who was murdered in store was harmless, in light of brief and straight forward nature of testimony.

[16] Criminal Law ⚿1171.1(6)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(6) Appeals to Sympathy or Prejudice; Argument as to Punishment.
State's improper argument about murder victim which appealed to emotions and sympathies of jury, taken in context and read as a whole, was not so inflammatory that it more probably than not prejudiced jury's verdict; state reminded jury of children victim had left behind, fact that victim was working during holidays to support his family when murdered during attempted robbery, and suggesting that holding defendant accountable would do justice. Rules App.Proc., Rule 36(b); Rules Crim.Proc., Rule 52(a).

[17] Sentencing and Punishment ⚿1780(2)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing

350Hk1780(2) Arguments and Conduct of Counsel.

(Formerly 110k722.5)
Prosecutor engaged in misconduct during closing argument in penalty phase of capital murder trial by informing jury that defendant had received life sentence as punishment for prior conviction for another murder.

[18] Sentencing and Punishment ⚿ 1780(2)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) Arguments and Conduct of Counsel.

(Formerly 110k722.5)
Prosecutor engaged in misconduct during closing argument of penalty phase of capital murder trial by extensively referring to facts of prior murder of which defendant had been convicted, including character of prior victim and impact of her death upon her family.

[19] Sentencing and Punishment ⚿ 1762
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1762 Other Offenses, Charges, or Misconduct.

(Formerly 110k1208.1(6))
Evidence of facts regarding previous conviction to show that it involved violence or threat of violence to person is admissible at sentencing hearing of capital case in order to establish aggravating circumstance, but evidence regarding specific facts of prior crime is not admissible if conviction on its face shows that it involved violence or threat of violence.

[20] Sentencing and Punishment ⚿ 1762
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)2 Evidence
350Hk1755 Admissibility
350Hk1762 Other Offenses, Charges, or Misconduct.

(Formerly 110k1208.1(6))
Evidence and argument regarding victim of crime other than crime for which defendant is being sentenced is irrelevant and inadmissible in penalty phase of capital murder trial.

[21] Sentencing and Punishment ⚿ 1780(2)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) Arguments and Conduct of Counsel.

(Formerly 110k722.5)
Prosecutor engaged in improper closing argument during penalty phase of capital murder trial by strongly implying that imposition of death penalty would be appropriate way to further punish defendant for prior killing for which defendant already had received life sentence.

[22] Sentencing and Punishment ⚿ 1780(2)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) Arguments and Conduct of Counsel.

(Formerly 110k723(1))
Prosecutor engaged in misconduct during closing argument of penalty phase of capital murder trial by making thinly veiled appeal to vengeance through reminder to jury that no one had been able to ask for mercy for murder victims, and by encouraging jury to give defendant same consideration he had given victims, although prosecutor could counsel jury to avoid emotional responses not rooted in evidence; argument improperly encouraged jury to make retaliatory sentencing decision rather than reasoned moral response to evidence.

[23] Criminal Law ⚿ 1171.1(3)
110 ----
110XXIV Review
110XXIV(Q) Harmless and Reversible Error
110k1171 Arguments and Conduct of Counsel
110k1171.1 In General
110k1171.1(2) Statements as to Facts, Comments, and Arguments
110k1171.1(3) Particular Statements, Comments, and Arguments.
Cumulative effect of improper prosecutorial argument during closing argument and admission of irrelevant evidence about defendant's prior murder conviction affected jury's determination in penalty phase of capital murder trial, and thus required reversal of sentence of death and remand for new sentencing hearing.

[24] Sentencing and Punishment ⚿ 1780(2)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(2) Arguments and Conduct of Counsel.

(Formerly 110k723(3))
State should avoid subject of general deterrence during argument in penalty phase of capital murder trial.

[25] Sentencing and Punishment ⚿ 1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.

(Formerly 110k796)
Instruction that jury must take into account only those aggravating circumstances proven beyond reasonable doubt, and no other facts or

circumstances, as basis for deciding whether to impose death penalty in capital murder trial sufficiently foreclosed consideration of irrelevant matters including deterrent effect of death penalty and cost of maintaining prisoner for life in prison, despite lack of specific instruction not to consider such matters.

[26] Sentencing and Punishment ⚿1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.

(Formerly 110k1213.7)
Eighth Amendment does not require instruction in penalty phase of capital murder trial to suggest that jury consider as mitigating circumstance any residual or lingering doubt it may have about defendant's guilt. U.S.C.A. Const.Amend. 8.

[27] Homicide ⚿311
203 ----
203VIII Trial
203VIII(C) Instructions
203k311 Punishment.
Specific instruction informing jury to consider criminal justice system's treatment of codefendants involved in attempted robbery and murder *797 as mitigating circumstance was not required in penalty phase of murder trial, in light of fact that jury learned during course of trial about codefendants' sentences and cooperation with authorities.

[28] Sentencing and Punishment ⚿1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.

(Formerly 203k311)
Trial court could charge jury pursuant to capital punishment statute in effect at time of offense, rather than pursuant to statute in effect at time of penalty phase of capital murder trial which applied standard of beyond reasonable doubt to issue of whether aggravating circumstances outweighed mitigating circumstances. T.C.A. § 39-13-204(g); § 39-2-203(g) (Repealed).

[29] Sentencing and Punishment ⚿1660
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1660 Dual Use of Evidence or Aggravating Factor.

(Formerly 203k357(10))
State's use of felony murder as aggravating circumstance for penalty phase of capital murder trial violated state constitution in light of fact that felony-murder aggravating circumstance merely duplicated crime itself without narrowing class of felony murderers eligible for death penalty. T.C.A. § 39-2-203(i)(7); § 39-2-204(i)(7) (Repealed); Const. Art. 1, § 16.

[30] Constitutional Law ⚿268(3)
92 ----
92XII Due Process of Law
92k256 Criminal Prosecutions
92k268 Trial
92k268(2) Particular Cases and Problems
92k268(3) Time of Trial in General; Opportunity to Obtain Counsel and Prepare.

[See headnote text below]

[30] Criminal Law ⚿577.10(5)
110 ----
110XVIII Time of Trial
110XVIII(B) Decisions Subsequent to 1966
110k577.10 Factors Affecting Application of Requirements in General
110k577.10(5) Multiple Charges or Defendants.
Defendant's due process rights were not violated by state's delay of capital murder trial until completion of another murder trial against defendant in order to provide aggravating circumstance of previous conviction of felony involving violence, regardless of chronological order in which crimes actually were committed. U.S.C.A. Const.Amends. 5, 14.

*800 Broch Mehler, Capitol Case Resource Center, Nashville, William B. Vest (deceased), Niceville, FL, for appellant.

Charles W. Burson, Atty. Gen. & Reporter, Rebecca L. Gundt, Asst. Atty. Gen., Nashville, for appellee.

OPINION

ANDERSON, Justice.

In this capital case, the defendant, Roosevelt Bigbee, was convicted of first-degree felony murder in an attempt to perpetrate a robbery. In the sentencing hearing, the jury found two aggravating circumstances: (1) that the defendant was previously convicted of one or more violent felonies; and (2) that the murder was committed while the defendant was attempting to commit a robbery. Tenn.Code Ann. § 39-2-203(i)(2), and (7) (1982). (FN1) The jury found that there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances and sentenced the defendant to death by electrocution.

On appeal, the defendant raises numerous issues for our review which involve alleged errors occurring during both the guilt and sentencing phases of trial. We have carefully considered the defendant's contentions as to errors occurring during the guilt phase and have decided that none require reversal. We therefore affirm the defendant's conviction.

However, we conclude that the sentence of death must be reversed and the case remanded for a new sentencing hearing. Irrelevant evidence was admitted regarding the defendant's previous conviction of first-degree felony murder, and that error, combined with improper prosecutorial argument, resulted in plain error that affected the

substantial rights of the defendant. Tenn.R.Crim.P. 52(b). Those errors were also compounded by the use in this case of the felony murder aggravating circumstance, which was held to be error under *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992) (Drowota, J. and O'Brien, J., dissenting). After reviewing the record, we are unable to conclude that the cumulative effect of the errors was harmless beyond a reasonable doubt. Accordingly, the sentence of death is reversed and the case remanded for resentencing.

FACTUAL BACKGROUND

The defendant was convicted of the felony murder of Monty Clymer, a relief clerk at a Delta Express Market in Hendersonville, Tennessee. Clymer, who worked the midnight shift, was killed sometime between 12:50 and 1:30 a.m. on December 28, 1988. Disarray about the store's counter and injuries to Clymer's body indicated a struggle had occurred. He had been beaten about the face and shot four times: one wound through the back left thigh, one through the back right shoulder, one graze wound to the right shoulder, and one contact wound to the left chest. The wound to the chest had been fatal. No money was missing from the market and $82.00 was found in the victim's wallet.

The key State's evidence in this case was testimony from the defendant's brother-in-law and co-defendant, Joe T. Baker, who had previously pled guilty to Clymer's murder and received a life sentence. Baker testified that on the evening of December 27, 1988, he and the defendant had picked up Chris and Joel Hoosier at a poolroom in Clarksville around 6:30 p.m. According to him, the four ***801** men rode around for awhile and discussed robbing a convenience store "somewhere away from Clarksville." Baker said that the group drove to Springfield, where Baker borrowed four pistols from a man named Tom Sircy, and that Chris Hoosier took a .25 caliber gun, Joel Hoosier a .22, the defendant a .38, and Baker a second .22. Baker related that the four then drove around for hours, wandering between Nashville and Springfield, smoking marijuana mixed with cocaine and looking for an "easy target" until they arrived at the Delta Market in Hendersonville.

When the four entered the market, Baker testified, Joel Hoosier, who was standing by the door, told Clymer to give him the money. Thinking Clymer was reaching for something other than cash, Baker stepped forward and began pistol whipping Clymer about the face. Chris Hoosier was standing behind Baker on the left; the defendant was to Baker's right. According to Baker, he struggled with Clymer until he felt his pistol slipping from his grasp and heard a gun fire. At that point, Clymer loosened his grip on Baker's wrist and fell to the floor. Firing his own pistol, Baker fled the market. Baker testified that for some unknown reason his gun stopped working during this time.

After the other three men returned to the car, Baker testified, Joel Hoosier tried to give Baker some money. Baker testified that before entering the market, none of the group had any money. Baker said that he had refused the money. Baker also told the jury that his companions had agreed with him when he had remarked that he hoped the clerk was dead because he had seen all of them. The four next drove to Springfield, according to Baker, where they gave the defendant's cousin, Lewis Mason, all of the guns except the .25, which Baker kept. Mason was to return the guns to Sircy. After leaving the Hoosiers at their house in Clarksville, Baker said, he and the defendant talked about what had happened. Baker said that when he asked the defendant if he had shot the clerk, the defendant replied that he had and claimed that he had done it because he was afraid the clerk would get Baker's pistol and Baker would be shot. "[H]e done it for me," explained Baker.

The State offered testimony in corroboration from another witness, Sandy Womack, who said that, on Father's Day 1989, while incarcerated in the Montgomery County Jail, he overheard a conversation between the youngest Hoosier brother, Eric, and the defendant, during which Eric had asked the defendant to tell him some things about the Hendersonville killing. When asked how many people Joe [Baker] said had had a gun in Hendersonville, the defendant told Eric, "We all got one." When asked how far away he had been standing when he shot, the defendant replied, "Two, three, four feet." The defendant also made a remark about his having held the gun "so high" during the episode that it could be seen from any car passing by the market. Womack said that the conversation occurred in the law library at the jail, which was accessible to all the prisoners. Womack also said that, although the defendant was in another wing of the jail, Hoosier was able to converse with the defendant because the steel doors in the law library separating the two wings had a one to two inch space all the way around them. Womack said he was able to overhear the conversation because he was standing near the door.

In addition to Baker and Womack, the State also called the defendant's cousin, Lewis Mason, as a witness. Mason testified that Baker and the defendant borrowed a .22 caliber gun from him twice near the end of 1988. When the gun was returned to him the second time, Mason said, it had a screw missing from the hammer. Mason specifically contradicted Baker's statement that he had given Mason the guns to return to Sircy on December 28, 1988.

None of the fingerprints found at the market nor any other physical evidence from the scene or the automobile driven by the offenders on the night of the killing connected the defendant, Baker, or the Hoosiers to the killing. The murder weapon was never found.

At the scene of the crime, police discovered two spent .22 caliber bullets, two spent .38 caliber bullets, and pieces of a broken trigger ***802** guard. A third .38 caliber bullet was removed from the fatal wound in Clymer's chest. A ballistics expert testified that the fatal wound was a contact wound. He said he was able to make that determination because the bullet had passed through five folds of the victim's shirt fabric. This indicated that the gun was being pressed against the shirt at the time it was fired.

Defense strategy at the guilt phase consisted, for the most part, of testimony or impeachment that

called into question the credibility of Baker and Womack and raised doubts about the evidence collected at the crime scene. On cross examination, the defense attorney questioned Baker closely and Baker acknowledged that he had lied repeatedly to both Clarksville and Hendersonville authorities, that he had been convicted of perjury as a result of his testimony at Joel Hoosier's preliminary hearing, that he looked upon the Hendersonville case as a way out of his problems in Clarksville where he was facing a capital trial, that he was willing to say almost anything to avoid the death penalty, that his testimony against Bigbee was part of a plea agreement with the State whereby he received a life sentence, and that he had been dishonorably discharged from the Marines after pleading guilty to forgery, making false statements, and conspiracy to possess and distribute cocaine.

Responses to cross-examination questions revealed that Womack had been convicted of two robberies in Montgomery County in March of 1989 and sentenced to 15 years and 50 years, that he had six robbery charges and an habitual criminal charge pending in Robertson County, and that he was under indictment in Davidson County. Womack admitted that, at least initially, he had cooperated with authorities in hopes of bettering his own situation; however, he denied ever receiving a deal. In response to questions that revealed the charges in Robertson County had been retired after Womack began cooperating with authorities in Sumner County, Womack insisted that retirement of the Robertson County charges was unrelated to his cooperation with Sumner County authorities.

As substantive evidence aimed at destroying the credibility of Baker and Womack, the defense offered the testimony of Tonya Baker, wife of Joe Baker and the defendant's sister. She testified that in either January or February of 1989, her husband instructed her to call the Hendersonville police department and ask them whether it was a man or a woman who had been killed at the Delta Market. She also testified that her husband had asked her to go to the library in Springfield and obtain newspaper articles about the Hendersonville killing. Tonya Baker further testified that she had determined the gender of the victim and related that information to her husband but had not obtained the newspaper accounts he had requested.

With respect to the credibility of Womack, a jailer at the Montgomery County jail testified that in May of 1989, when Womack said he had overheard the conversation between the defendant and Eric Hoosier, the law library was accessible to prisoners only during GED classes or other special programs and that during those times guards were in the room. The jailer also testified that communication between the steel doors separating the two wings of the jail could only be accomplished by screaming because there was no two-inch space around the doors as Womack had testified.

Finally, to show that Baker and Womack's accounts of the killing were in conflict with the physical evidence, the defense relied upon the State's ballistic expert, who testified that the fatal wound, fired from the .38 caliber gun, had been a contact wound. Both Womack and Baker had testified that the defendant was at least two feet away from Clymer when the shot was fired.

Based on all the evidence presented in the guilt phase, the jury found the defendant, Roosevelt Bigbee, guilty of first-degree felony murder during an attempted robbery.

In the sentencing phase of the trial, the State relied upon the evidence presented during the guilt phase and also introduced certified copies of the defendant's previous convictions of first degree felony murder and robbery by use of a deadly weapon in August of 1990, in Montgomery County, Tennessee. In addition to the certified copies of the ***803** convictions, the State presented testimony from Jay Runyon, one of the detectives in charge of investigating the murder in Montgomery County. Runyon informed the jury that the Clarksville murder occurred in a convenience store; that the victim, a forty-year-old female with four children, was the clerk of the store; that the murder occurred at 1:17 a.m.; and that the victim was shot twice but had three bullet wounds to her body, two in her chest and one, a defensive wound, in the palm of her hand.

The defendant presented no proof at the sentencing phase; however, the trial judge allowed his attorney to convey to the jury that the defendant wanted them to know that he was innocent of the murder.

Based on the proof, the jury found the existence of two aggravating circumstances beyond a reasonable doubt. These were: (1) that the defendant had been previously convicted of a violent felony offense and (2) that the murder was committed while the defendant was engaged in attempting to commit a felony, robbery. Tenn.Code Ann. § 39-2-203(i)(2) and (7) (1982). In addition, the jury found that the mitigating circumstances were not sufficiently substantial to outweigh the aggravating circumstances and, as a result, sentenced the defendant to death.

PART I.

GUILT PHASE--TRIAL ERRORS

A. Sufficiency of the Proof

1. Corroboration of Accomplice Testimony

[1] The defendant argues that the evidence is insufficient to support the jury verdict finding him guilty of first degree felony murder because there was insufficient evidence to corroborate the testimony of Baker, an accomplice.

It is well-established that a jury verdict, approved by the trial judge, accredits the testimony of the witnesses for the State, resolves all conflicts in favor of the theory of the State, and removes the presumption of innocence. *State v. Harris,* 839 S.W.2d 54, 75 (Tenn.1992). On appeal, the State is entitled to the strongest legitimate view of the evidence and all reasonable inferences which might be drawn therefrom. *State v. Cabbage,* 571 S.W.2d 832, 835 (Tenn.1978). Where, as here, the sufficiency of the convicting evidence is challenged, the relevant question for an appellate court is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact could

have found the defendant guilty beyond a reasonable doubt. Tenn.R.App.P. 13(e); *Jackson v. Virginia,* 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

It is beyond dispute that in Tennessee a conviction may not be based upon the uncorroborated testimony of an accomplice. *Monts v. State,* 214 Tenn. 171, 379 S.W.2d 34, 43 (1964); *Stanley v. State,* 189 Tenn. 110, 222 S.W.2d 384 (1949). Whether a witness' testimony has been sufficiently corroborated is a matter entrusted to the jury as the trier of fact. *Id.* Tennessee courts have discussed the nature of the rule as follows:

> [T]here must be some fact testified to, entirely independent of the accomplice's testimony, which, taken by itself, leads to the inference, not only that a crime has been committed, but also that the defendant is implicated in it; and this independent corroborative testimony must also include some fact establishing the defendant's identity. This corroborative evidence may be direct or entirely circumstantial, and it need not be adequate, in and of itself, to support a conviction; it is sufficient to meet the requirements of the rule if it fairly and legitimately tends to connect the defendant with the commission of the crime charged. It is not necessary that the corroboration extend to every part of the accomplice's evidence. The corroboration need not be conclusive, but it is sufficient if this evidence, of itself, tends to connect the defendant with the commission of the offense, although the evidence is slight and entitled, when standing alone, to but little consideration.

State v. Gaylor, 862 S.W.2d 546, 552 (Tenn.Crim.App.1992), quoting *Hawkins v. State,* 4 Tenn.Crim.App. 121, 469 S.W.2d 515 (1971); *see also State v. Henley,* 774 S.W.2d 908, 913 (Tenn.1989); *State v. Sparks,* 727 S.W.2d ***804** 480, 483 (Tenn.1987); *State v. Carter,* 714 S.W.2d 241, 244-45 (Tenn.1986).

The defendant says that the only evidence in this case corroborating Baker and implicating the defendant in the commission of the crime is Womack's testimony, which should be disregarded as false because it was physically and logically impossible for the conversation between the defendant and Eric Hoosier to have occurred as Womack said it had. These questions about Womack's credibility were presented to the jury during the trial. The credibility of the testimony of the witnesses is entrusted exclusively to the jury as the triers of fact. *State v. Sheffield,* 676 S.W.2d 542, 547 (Tenn.1984). Likewise, whether a witness's testimony has been sufficiently corroborated is a matter entrusted to the jury. *Stanley v. State,* 222 S.W.2d at 386. The defendant's challenge to the sufficiency of the convicting evidence is without merit.

2. Inadequate Instructions

[2] Defendant next says the verdict is invalid because the trial court judge did not instruct the jury to consider the testimony of an informer (Womack) or an accomplice (Baker) with greater care and caution than that used to examine the testimony of other witnesses. In the present case, the defendant did not object to the instructions given regarding accomplice testimony or credibility of witnesses, and no special requests were made for the cautionary instructions defendant now argues were necessary. Although, as the State notes, the defendant's failure to object or assert the issues now assigned as error amounts to waiver of these issues for purposes of appellate review, we have considered them and find that the court's charge fully and fairly stated the applicable law. *See* Tenn.R.App.P. 3(e) and 36(a); Tenn.R.Crim.P. 30(b). Thus, the defendant's argument is without merit.

In *Stanley v. State, supra,* this Court concluded that it is not necessary that a jury be charged to receive accomplice testimony with caution, because "[i]t seems to us that when the trial judge charges the jury as he did, that conviction could not be had upon the unsupported testimony of [an accomplice], that this within itself was tantamount to telling the jury that the testimony was not favored in the law to the same extent as that of an unbiased witness...." 222 S.W.2d at 388; *see also State v. Hutchison,* 1994 WL 242632 (Tenn.1994).

Likewise, when viewed in context, the charge given the jury regarding the credibility of other witnesses fully and fairly states the law. In the event of conflicting statements made by different witnesses the jury was charged to "reconcile them, if you can, without just rashly concluding that any witness has sworn falsely, for the law presumes that all witnesses are truthful." The instruction given by the trial court was a correct statement of the law. *See e.g. State v. Lee,* 634 S.W.2d 645 (Tenn.Crim.App.1982); *State v. Glebock,* 616 S.W.2d 897 (Tenn.Crim.App.1981); *Hull v. State,* 553 S.W.2d 90 (Tenn.Crim.App.1977).

3. Missing Witness Instruction

[3] The defendant last argues that the trial court judge erred in denying his request that the missing witness instruction be given with regard to Joel Hoosier. In support of this argument, the defendant says that Hoosier had earlier received immunity from prosecution by the State, that this grant of immunity indicates his testimony would have "favored" the State and that his testimony would have been material because he was an accomplice. The trial court denied the defendant's request because Joel Hoosier was available to either side as a witness.

Before the missing witness rule can be invoked, the evidence must show that "the witness had knowledge of material facts, that a relationship exists between the witness and the party that would naturally incline the witness to favor the party and that the missing witness was available to the process of the Court for trial." *State v. Middlebrooks,* 840 S.W.2d at 334-35, quoting *Delk v. State,* 590 S.W.2d 435, 440 (Tenn.1979). Since Hoosier was equally available to either party and there is nothing in the record to indicate that a relationship existed between the State and Hoosier that would naturally incline Hoosier to testify favorably for the State, the trial ***805** court's ruling was correct, and the defendant's claim is without merit.

B. Impartial Jury

[4] The defendant next insists that he was denied his right to an impartial jury under the 6th and 14th Amendment to the United States Constitution and Article I, §§ 8 and 9, of the Tennessee Constitution. Essentially, the defendant, a black man, claims that juror Ricky Gregory demonstrated racial prejudice against him. He bases that claim on Gregory's wearing a T-shirt that read "Southern Justice" and on Gregory's actions when the sentencing verdict was announced.

On March 14, 1991, the next-to-last day of trial, Gregory appeared at the court house wearing a T-shirt with the words "Southern Justice" noticeably printed on it. At the court's request, Gregory changed his shirt; however, Gregory informed the court that he was a member of a band named "Southern Justice." The defendant refused the court's offer to replace Gregory with an alternate juror.

On the next day, when the sentence was announced, Gregory was allegedly seen raising his right arm with his fist clenched and quickly lowering it as if pulling the handle on an electric switchbox. At the same time he allegedly uttered the word, "Yeah." Gregory and three other jurors were later seen hugging the victim's sister-in-law and brother in the hallway of the courthouse. In its findings on this issue at the hearing on the Motion for New Trial, the court interpreted Gregory's actions as his reaction to the verdict, which the court felt was the result of adequate deliberation; therefore, the trial court overruled the defendant's request for a new trial on this issue.

[5] During his individual voir dire, Gregory expressly stated that he could be impartial. Where a juror is not legally disqualified or there is no inherent prejudice, the burden is on the defendant to show that a juror is in some way biased or prejudiced. *State v. Caughron,* 855 S.W.2d 526, 539 (Tenn.1993). The record in this case does not support the defendant's claim of bias or prejudice. This issue is without merit.

C. Suppression of Statement to Eric Hoosier

[6] The defendant contends that even assuming he made statements to Eric Hoosier which were overheard by Sandy Womack, testimony regarding those statements should have been suppressed because Womack was acting as an agent for the State when he instigated the deceptive interrogation of the defendant while the defendant was in custody and represented by counsel. Defendant says the statements were obtained in violation of his rights of due process, assistance of counsel, and against self-incrimination. He also urges the Court to exercise its supervisory powers to "remedy the improprieties that have occurred in the prosecution of this case."

The defendant filed no pretrial motion to suppress these statements. He did not object to Womack's testimony on these grounds at trial, nor did he raise this issue in his motion for new trial; therefore, the State argues waiver. Tenn.R.App.P. 3(e) and 36(a); *State v. Coker,* 746 S.W.2d 167, 173 (Tenn.1987).

Relying on *State v. Duncan,* 698 S.W.2d 63, 67-68 (Tenn.1985), and *State v. Martin,* 702 S.W.2d 560, 564 (Tenn.1985), the defendant argues that the appellate review mandated by Tenn.Code Ann. § 39-2-205 [now § 39-13-206] requires this Court to consider any alleged error, whether called to the trial court's attention or not.

As in *State v. Duncan, supra,* we have reviewed the record in this case in light of the defendant's complaint and conclude that here, as in that earlier case, there is nothing in the record to support the contentions of the defendant. In the absence of an objection or motion challenging the evidence on the grounds now asserted, the proof was not focused by either party so as to delineate fully the critical issue of whether or not Womack was acting as an agent for the State. *See State v. Duncan,* 698 S.W.2d at 68. On this record, the defendant's claim is without merit.

**806 D. Admission of Evidence*

The defendant next complains that the trial court erred in several respects in admitting certain evidence at trial. Initially we note that the admissibility of evidence is a matter within the discretion of the trial court, whose decision will not be reversed on appeal absent a showing of abuse of discretion. *State v. Harris,* 839 S.W.2d 54, 66 (Tenn.1992).

[7] The first piece of evidence objected to is a loaded .22 caliber pistol and holster found under the back seat of a patrol car in which the defendant and Chris Hoosier had been seated before they were transferred to Hendersonville from the Montgomery County Jail on September 16, 1989. The gun could not be traced to any of the suspects or to anything at the crime scene. The trial court ruled, nevertheless, that the gun was admissible for the reasons given by the State at the suppression hearing--flight, attempt to escape, consciousness of guilt--to show intent, mental status "and so forth, without elaborating." This gun and its discovery during the transfer of the defendant are irrelevant, as the State concedes on appeal. *See* Tenn.R.Evid. 401, 404(b). The State argues, however, that any error was harmless since proof of the defendant's guilt was overwhelming.

We agree with the State that the error in this instance was harmless. Tenn.R.Crim.P. 52(a). The defense attorney was given wide latitude in eliciting statements on cross-examination and in offering substantive testimony for the purpose of demonstrating how extremely difficult, if not impossible, it would have been for either the defendant or Chris Hoosier to smuggle a loaded gun and holster out of the Montgomery County jail. Therefore, we conclude that the error in admitting the irrelevant evidence was harmless because it does not "affirmatively appear to have affected the result of the trial on the merits." (FN2) Tenn.R.Crim.P. 52(a).

We observe, however, that this case illustrates the utility and purpose of Tennessee Rule of Evidence 404(b) which provides that before evidence of prior bad acts is admitted, the trial court must hold a jury out hearing, determine that the evidence is relevant to a material issue other than character, state on the record the *specific* issue to which the evidence is relevant, and conclude that the prejudicial effect of the evidence does not outweigh its probative value. Not only does the admission of irrelevant bad acts

evidence have a high potential for prejudice, the testimony required to establish, as well as rebut, the prior bad act can substantially lengthen a trial, as this case demonstrates. Rule 404(b) should be followed closely to avoid prejudicing the rights of the accused and to maintain the focus of the trial.

[8] Next, the defendant complains of the admission into evidence of a .22 caliber revolver twice loaned to Baker and the defendant by defendant's cousin, Robert Mason, at the end of 1988. Although bullets fired from .22 and .38 caliber weapons were found at the crime scene, the State's TBI firearms expert testified that none of the .22 bullets could have been fired from the .22 admitted at trial. The trial court ruled on the admissibility of this evidence at a hearing on a pre-trial motion in limine made on behalf of Baker by his attorney. With regards to Baker, the trial court found the evidence admissible to show that Baker had access to guns when the offense occurred. The present defendant's lawyer asked whether this ruling applied to the defendant, and the court said it could only rule on that question at trial. The defendant made no objection to this evidence at trial. The State argues waiver. We have considered the defendant's argument and conclude it is without merit.

The record shows that two .22 caliber weapons were used in the crime and that Robert Mason was involved in their procurement. All .22 bullets retrieved from the crime scene were fired from the same gun; therefore, the failure to connect Mason's .22 to these bullets did not eliminate it as one of *807 the two .22 caliber guns used in the robbery. There was no testimony Joel Hoosier had fired the .22 revolver he had gotten from Sircy and Baker. Thus, although the relevancy of the evidence was marginal, we cannot say that its probative value was substantially outweighed by its prejudicial effect. Accordingly, we conclude that the trial court judge did not abuse his discretion in admitting the evidence. *See* Tenn.R.Evid. 403; *State v. Harris, supra.*

[9][10] Finally, defendant says that the trial court erred in allowing the jury to see a video of the crime scene, a short portion of which showed the victim's body and face as they appeared several hours after the murder. Defendant asserts that this part of the tape was cumulative in light of the numerous photographs of the body and that it was inflammatory and lacked probative value. The admissibility of videotapes of a crime scene is within the sound discretion of the trial judge, and his ruling on the admissibility of such evidence will not be overturned without a clear showing of abuse of discretion. *State v. Van Tran,* 864 S.W.2d 465, 477 (Tenn.1993). Though the challenged portion of the tape is unpleasant because it shows postmortem lividity and some rigor mortis, the trial court did not abuse its discretion in allowing that part of the videotape to be played. *See* Tenn.R.Evid. 403; *State v. Evans,* 838 S.W.2d 185 (Tenn.1992); *State v. Banks,* 564 S.W.2d 947 (Tenn.1978).

E. Failure to Supply Exculpatory Evidence

Defendant claims that because the police, prior to trial, withheld from the defense knowledge of the existence of identifiable fingerprints and a footprint, he could not effectively use this evidence in his defense at trial. The defendant alleges that this action by the police violated his statutory right to discovery, orders of the trial court, and his constitutional rights under *United States v. Bagley,* 473 U.S. 667, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985), which held that impeachment evidence falls within the *Brady* rule.

A hearing was held on this issue, which was raised in the motion for new trial. The record discloses that two conferences were held between the attorneys for defendant (FN3) and representatives of the State, including the State's attorneys and law enforcement officers, to review the materials sought in discovery by the defendants. Defendant was informed that none of the fingerprints found at the crime scene implicated the defendant, Baker or any other suspect named by Baker.

Apparently there was a misunderstanding between defense counsel and the State concerning the nature of the fingerprints that had been found. Defense counsel testified that police had led them to believe that the latent prints lifted at the scene were unidentifiable smudges when there were actually identifiable prints among them, although none were ever matched with any known individual. The officers denied they had told defense counsel that the prints were smudges and testified that they had never showed defense counsel the photographs of the fingerprints because counsel had never asked to see them. The fact that there were identifiable prints taken from the scene that had not been identified as belonging to any person was brought out at trial.

In his brief on appeal, the defendant argues that the evidence *excludes* him and the other suspects, and says that if he had known there were identifiable fingerprints not belonging to the four suspects he would have pursued those fingerprints. Defendant also contends that, had he known that an examination of the prints by the Metropolitan Nashville Police Department had excluded him as the person who had made the fingerprints, he would have called the Department's latent fingerprint examiner as a defense witness and he would have cross-examined Joe Baker in detail as to where he had been in the store and what he had touched.

Defendant also apparently complains of not being advised until the middle of the trial that the police had excluded the four suspects as the persons who had left two footprints *808 at the scene of the crime. The police had reached this conclusion after seizing all tennis shoes owned by the four men and comparing them to the footprint patterns.

The trial court found that the evidence alleged to have been withheld by the State was not suppressed and had in fact been brought out at the trial; therefore, the defendant's motion for a new trial on that ground was overruled.

[11][12] In order to prove a violation of *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), the defendant must establish that the prosecutor suppressed discoverable information, that such information was of a favorable character for the defense, and that the suppressed information was material. *State v. Evans,* 838 S.W.2d at 196. We find no evidence in this record to support a *Brady* violation. The record shows no intentional

withholding of any exculpatory evidence but rather a misunderstanding between the State and the defense lawyers. The evidence allegedly withheld was in fact brought out at trial. The evidence did not exclude the defendant; it merely did not implicate him. Having found no prosecutorial misconduct, this issue is without merit.

[13] Defendant also complains that argument by the State at the guilt phase concerning the defendant's lack of knowledge of these prints prejudiced him. During closing argument defense counsel had argued that the fingerprint photographs had suddenly appeared at trial and that it would have been "nice to have known ... ahead of time" that these prints excluded the defendant and his companions. The State responded by arguing that defense counsel would have the jury believe that he had just learned that there had been fingerprints taken by the Metropolitan police that did not match the defendant's prints and that the State had withheld evidence. The prosecutor added that in actuality defense counsel had known for two years that the State had found no prints matching the defendant's. Defendant says the State was arguing that defense counsel was lying, but the record shows that the prosecutor's statement was fair rebuttal of defense counsel's remarks. *See State v. Workman,* 667 S.W.2d 44, 51 (Tenn.1984); *State v. Sutton,* 562 S.W.2d 820, 823-824 (Tenn.1978). This issue is without merit.

F. Victim Character & Impact Evidence

The defendant argues that the admission of evidence and argument concerning the victim's character and the impact of his death at the guilt phase of his trial violated his rights under the 14th Amendment to the United States Constitution and Article I, §§ 8 and 9, of the Tennessee Constitution. The defendant first complains of the testimony of the victim's seventeen-year-old daughter concerning herself and her family and of the introduction of a photograph of her father. Defendant also complains of testimony from the store manager about the victim's job, his wages and his status as a good employee. No objection was made to this evidence at trial and this issue was not raised on motion for new trial. The State argues waiver. *See* Tenn.R.App.P. 3(e). We have considered the defendant's complaint, however, and find any error to be, at most, harmless.

[14][15] A reading of the record reveals that the evidence complained of was far from extensive, and it was not prejudicial. The daughter's testimony was properly introduced to show that she had spoken with her father by telephone around 11:30-11:45 p.m. the night of his death. *See State v. Hurley,* 876 S.W.2d 57, 67 (Tenn.1993). The relevance of the store manager's testimony is not entirely clear from the record, primarily because the defendant never challenged its admission and thereby require that its relevance be established. However, the testimony was brief and straightforward, and any error in its admission was harmless. *See State v. Hensley,* 656 S.W.2d 410 (Tenn.Crim.App.1983).

A cause for greater concern is the State's argument to the jury about the victim, reminding them of the children he had left behind, of the fact that he was working during the holidays to support his family when the crime occurred, and suggesting that holding the defendant accountable was a way to do justice.

***809** [16] It is beyond dispute that the State may risk reversal by engaging in argument which appeals to the emotions and sympathies of the jury, *see, e.g., Sparks v. State,* 563 S.W.2d 564, 569 (Tenn.Crim.App.1978); 23A C.J.S. *Criminal Law* § 1270(c) (1989). Taken in context and read as a whole, however, the argument in this case, although error, was not so inflammatory that it more probably than not prejudiced the jury's verdict. *See* Tenn.R.App.P. 36(b); Tenn.R.Crim.P. 52(a). We do not approve this argument by our holding, however, and caution the State against repeating it in the future.

PART II.

SENTENCING

A. Prosecutorial Misconduct

Defendant contends that prosecutorial argument during the penalty phase led to an arbitrary and unreliable sentence in violation of the 8th and 14th Amendments to the United States Constitution and Article I, § § 8 and 16, of the Tennessee Constitution.

In particular, the defendant says that his sentence should be reversed because of prosecutorial argument: 1) portraying him as the actual killer in both the Sumner County murder and the murder in Montgomery County for which he had been previously convicted of first-degree felony murder; 2) emphasizing the character of the victim of the Montgomery County murder and the impact of her death on her family; 3) informing the jury that the defendant had received a life sentence for the Montgomery County murder and pointing out the futility of imposing a second life sentence; 4) implying that the defendant should be sentenced to death in this case as punishment for the Montgomery County killing; 5) appealing to the jury to react out of vengeance; 6) claiming that the death penalty is a general deterrent; and 7) comparing imposition of the death penalty with the juror's civic and patriotic duty. The State correctly points out that, with the exception of the victim character and impact argument, no objection was raised to any of these occurrences at trial, nor were they raised in the motion for new trial.

Courts have recognized that closing argument is a valuable privilege for both the State and the defense and have allowed wide latitude to counsel in arguing their cases to the jury. *State v. Cone,* 665 S.W.2d 87, 94 (Tenn.1984). When a prosecutor's argument strays beyond the wide latitude afforded, the test for determining whether reversal is required is whether the impropriety "affected the verdict to the prejudice of the defendant." *Harrington v. State,* 215 Tenn. 338, 385 S.W.2d 758, 759 (1965). Factors relevant to that determination include:

(1) the conduct complained of viewed in light of the facts and circumstances of the case;

(2) the curative measures undertaken by the court

and the prosecution;

(3) the intent of the prosecutor in making the improper arguments;

(4) the cumulative effect of the improper conduct and any other errors in the record; and

(5) the relative strength and weakness of the case.

State v. Buck, 670 S.W.2d 600, 609 (Tenn.1984); *Judge v. State,* 539 S.W.2d 340, 344 (Tenn.Crim.App.1976). We have adhered to these guiding principles in our evaluation of the defendant's claims.

[17] We have examined the record in light of the claims of error and conclude that the sentence must be reversed. Tenn.R.Crim.P. 52(b). Informing the jury that the defendant received a life sentence as punishment for his conviction of first-degree felony murder in Montgomery County was in direct contravention of this Court's holding in *State v. Smith,* 755 S.W.2d 757, 767 (Tenn.1988) ("Smith I"). That error was further compounded by admitting into evidence the underlying facts of the defendant's previous conviction of first-degree murder, including testimony from Jay Runyon, one of the detectives in charge of investigating the Montgomery County murder. Specifically, Runyon informed the jury that the murder occurred around 1:17 a.m. in a Montgomery County convenience store when Vada Langston, the clerk and forty-year-old mother of four, had been shot and killed. Runyon explained that, while only two shots had been ***810** fired, Langston had been wounded three times, once in her hand and twice in her chest.

During closing argument, the prosecutor not only discussed the sentence imposed as a result of the Montgomery County conviction but also extensively referred to the facts of the Montgomery County murder, the character of the victim of that killing and the impact of her death upon her family, and, finally, implied that imposition of the death penalty in this case would be an appropriate way to punish the defendant's previous conviction of the Montgomery County murder. Excerpts of the improper prosecutorial closing argument are set forth below.

> Ladies and gentlemen, Vada Langston was killed on January 9th, 1990--1989, excuse me, just 12 days, 12 days, after Monty Clymer was killed here. She was 40 years old. She had four children. She was found lying behind the counter with two bullet holes in her chest and one bullet hole in her hand. Two shots had been fired, one through the chest and the other was a defensive measure or covering her chest. She'd been shot twice. She was, like I told you about Monty Clymer, she was innocent as the driven snow. Seventy-three dollars was taken for her death.... He was convicted on August 24th, 1990, for first-degree murder and received a life sentence.
>
> ....
>
> I anticipate in a few minutes the defense will ask for mercy for the life of Roosevelt Bigbee.... There was nobody there on January 9th 1990, to ask for mercy for Vada Langston, none of her children, none of her family. Nobody was there when she was shot the first time to ask for mercy for her life. There was nobody there from her family to ask for mercy when she was shot the second time. Nobody to ask for mercy for her.
>
> Ladies and gentlemen, you can't escape the fact that Roosevelt Bigbee has killed two completely innocent human beings, never to see their families again, never afforded the opportunity to ask for mercy. Were [sic] not talking about one life, ladies and gentlemen. We're talking about two lives.
>
> ....
>
> Ladies and gentlemen, the death penalty is the ultimate punishment in society. It's a punishment and for the protection of society. The only way to stop the Roosevelt Bigbees of this world who have killed more than one person, for those who have no respect for law and order and doing right, and for the lives of others, and to stop the madness and the innocent slaughter of convenience store clerks making an honest, decent living completely unprotected is the death penalty.
>
> Later, in rebuttal, the State argued:
>
> We have got two people that are dead because of what Mr. Bigbee did, and Mr. Baker--Mr. Bigbee is here on trial. Two people that are dead. Seven children that are left without parents.
>
> ....
>
> Now, ladies and gentlemen, another thing is Mr. Bigbee has already received a life sentence, a life sentence. He's in prison now serving a life sentence. What's another life sentence going to do? Nothing. He's already got a life sentence. Another life sentence is no skin off his nose. What does the death of Monty Clymer mean if he gets a life sentence under these circumstances? How many people would it take to be killed at a cash register before Roosevelt Bigbee would be deserving of the death penalty?
>
> ....
>
> The death of Vada Langston and armed robbery, three wounds that she suffered, a defensive wound or clutching wound, think of that. Think of Monty Clymer. Decide what is the proper punishment in this case. Is it enough just to give him another life sentence? he already has a life sentence. Is it enough? To say we value the human life of Monty Clymer, of Vada Langston, and any human life that's being taken under these circumstances so much that we're imposing the appropriate punishment ***811** as set out in Tennessee law, that's the death penalty.

In *Smith I, supra,* this Court found that the failure of a trial court to sever the trials of the defendant's two charges of felony murder at two separate markets was harmful error as to sentencing. Primarily, the error resulted from the fact that the sentencing jury was made aware that the defendant had received a life sentence for one of the murders. The prejudicial effect of making the jury aware of the life sentence was discussed in *Smith I,* as

follows:

> We think it clear, as insisted by the defendant, that evidence of the defendant's involvement in the Pierce case necessarily affected the jury's deliberation concerning punishment in the Webb case. As a practical matter, making known to the jury the defendant's involvement in the Pierce case and his punishment in that case effectively eliminated the option of life imprisonment as a sentence for defendant in the Webb case. It opened the door for the State's attorney to argue in the sentencing phase of the Webb case that "to give life, a punishment of life, in this second killing is the equivalent of giving no punishment at all." We think that the prejudice to the defendant is obvious and the defendant's punishment in the Webb case should have been determined without regard to the Pierce case or the punishment to which the defendant was sentenced in that case. The only way to insure that the defendant's punishment in the Webb case would be determined on the merits of that case and without regard to the Pierce case was for the trial judge to have granted the motion for severance of the two offenses. In denying that severance, the trial judge committed reversible error.

Id. at 767.

Despite this Court's holding in *Smith I*, evidence of the life sentence was again admitted at the sentencing hearing conducted after remand. Once again, the defendant appealed and challenged admission of the evidence. This Court again reversed and remanded for a new sentencing hearing, stating, "[w]e are deeply troubled about the overall effect of the admission of evidence of the *sentence* in the Pierce case at the sentencing hearing in the second trial." *State v. Smith*, 857 S.W.2d 1, 24 (Tenn.1993) ("*Smith II* ").

Despite the State's contention in *Smith II* that the issue had been waived by the defendant's failure to object and despite "[t]he suggestion that the failure to object was a strategic maneuver by the defense to obtain a life sentence," *id.* at 25, we determined that the error had prejudicially affected the sentence and declined to attribute the failure to object to defense strategy stating, "[t]he issue of whether either or both counsel were attempting to sandbag the other is a matter of pure speculation." *Id.* We think that statement adequately addresses the arguments made by the State in this case as well. Admitting evidence of the sentence imposed upon the defendant as a result of the Montgomery County conviction was error in this case for the reasons stated in *Smith I* and *Smith II, supra*. *See also State v. Jones*, 789 S.W.2d 545, 552 (Tenn.1990); *State v. House*, 743 S.W.2d 141, 147 (Tenn.1987).

[18][19] The error was compounded, however, by the testimony of Detective Runyon. Evidence of facts regarding a previous conviction to show that it in fact involved violence or the threat of violence to the person is admissible at a sentencing hearing in order to establish the aggravating circumstance. *State v. Bates*, 804 S.W.2d 868, 879 (Tenn.1983); *State v. Moore*, 614 S.W.2d 348, 351 (Tenn.1981). (FN4) However, it is not appropriate to admit evidence regarding specific facts of the crime resulting in the previous conviction, when the conviction on its face shows that it involved violence or the threat of violence to the person. *Id.* In this case, Detective Runyon was permitted to testify as to the facts upon which the defendant's previous convictions were based.

[20] Furthermore, although argument and evidence regarding the victim of this ***812** crime is not precluded by either the state or federal constitutions, *see Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *State v. Brimmer*, 876 S.W.2d 75, 86 (Tenn.1994), evidence and argument regarding the victim of a crime other than the crime for which the defendant is being sentenced is irrelevant and inadmissible. *Cf. Cozzolino v. State*, 584 S.W.2d 765, 767-68 (Tenn.1979) (State's evidence is limited to establishing statutory aggravating circumstances unless other evidence is necessary to respond to the defendant's proof). Here, Detective Runyon testified about the family situation of the victim of the Montgomery County murder, and the State seized upon that testimony in its closing argument to the jury. Detective Runyon's testimony and the prosecution's argument regarding the victim of an unrelated crime were inadmissible and improper.

[21] The prosecutor also engaged in improper argument by strongly implying during argument that imposition of the death penalty in this case would be an appropriate way to further punish the defendant for the Montgomery County killing, for which he had already received a life sentence. *See Lesko v. Lehman*, 925 F.2d 1527, 1545-46 (3d Cir.1991); *Cf. Rogers v. Lynaugh*, 848 F.2d 606, 611 (5th Cir.1988) (prosecutor's argument that jury's sentence should include punishment for prior felony convictions constituted violation of double jeopardy); *Knight v. State*, 190 Tenn. 326, 229 S.W.2d 501, 503-504 (1950) (reversible error in prosecutor's argument that defendant should be convicted for the good of society on general principles because he was guilty of crimes other than that for which he was being tried).

Obviously, the State may argue that the existence of the prior conviction as an aggravating circumstance supports imposition of the death penalty; however, in this case, the State's argument went beyond that limit and strongly implied, without flatly stating, that the defendant should be sentenced to death as additional punishment for the previous conviction. The defendant had already been tried, convicted and separately sentenced for that crime. Argument encouraging this jury to impose an additional punishment was improper.

[22] Finally, the prosecutor strayed beyond the bounds of acceptable argument by making a thinly veiled appeal to vengeance, reminding the jury that there had been no one there to ask for mercy for the victims of the killings in Sumner and Montgomery Counties, and encouraging the jury to give the defendant the same consideration that he had given his victims. Although the prosecutor could have properly counseled the jury to avoid emotional responses that were not rooted in the trial evidence, *see California v. Brown*, 479 U.S. 538, 542-43, 107 S.Ct. 837, 839-40, 93 L.Ed.2d 934 (1987), the argument here encouraged the jury to make a retaliatory sentencing decision, rather than a decision based on a reasoned moral response to the

evidence. As such, the argument was improper. *Lesko v. Lehman,* 925 F.2d at 1545.

[23][24] Though each of the errors discussed above might have been harmless standing alone, we find that, considered cumulatively, the improper prosecutorial argument and the admission of irrelevant evidence affected the jury's sentencing determination to the defendant's prejudice. Therefore, we conclude that the sentence of death must be reversed and the case remanded for a new sentencing hearing. In addition to the specific areas of argument discussed above, the State should also avoid the subject of general deterrence during argument at the new sentencing hearing. *See State v. Irick,* 762 S.W.2d 121, 131 (Tenn.1988).

Due to the necessity of a remand, only those issues which may become relevant at the new sentencing hearing will be discussed below. Other issues are pretermitted.

B. Instructional Errors

1. Deterrence

[25] The defendant avers that the trial court erred when it refused to instruct the jury not to consider during its deliberations the deterrent effect of the death penalty nor the cost of maintaining a prisoner for life in prison. While neither of these factors should enter a capital jury's sentencing determination, *cf., e.g., State v. Irick,* 762 S.W.2d 121, 131 (Tenn.1988); *State v. Johnson,* 632 ***813** S.W.2d 542, 547-48 (Tenn.1982), this Court has never required such an instruction. We conclude that the trial court's instruction that the jury must only take into account those aggravating circumstances proven beyond a reasonable doubt and no other facts or circumstances as a basis for deciding whether to impose the death penalty was appropriate and sufficient to foreclose consideration of any irrelevant matters. There is no merit to this issue.

2. Lingering Doubt

[26] Defendant also insists that he was entitled to an instruction that the jury may consider as a mitigating circumstance "any residual or lingering doubt you may have about [defendant's] guilt, if in fact you have such doubt." The Eighth Amendment of the United States Constitution does not require a lingering or residual doubt instruction. *See Franklin v. Lynaugh,* 487 U.S. 164, 173-74, 108 S.Ct. 2320, 2326-28, 101 L.Ed.2d 155 (1988). In so concluding, the United States Supreme Court stated:

> Our decisions mandating jury consideration of mitigating circumstances provide no support for petitioner's claim because "residual doubt" about guilt is not a mitigating circumstance. We have defined mitigating circumstances as facts about the defendant's character or background, or the circumstances of the particular offense, that may call for a penalty less than death. [Citations omitted.] "Residual doubt" is not a fact about the defendant or the circumstances of the crime. It is instead a lingering uncertainty about facts, a state of mind that exists somewhere between "beyond a reasonable doubt" and "absolute certainty." Petitioner's "residual doubt" claim is that the States must permit capital sentencing bodies to demand proof of guilt to "an absolute certainty" before imposing the death sentence. Nothing in our cases mandates the imposition of this heightened burden of proof at capital sentencing.

Id., 487 U.S. at 189, 108 S.Ct. at 2335 (O'Connor, J., concurring).

We agree with the U.S. Supreme Court's analysis of the issue and conclude that the trial court did not err in denying the defendant's request for an instruction on "lingering or residual" doubt.

We should point out, however, that "[a]t a resentencing hearing, both the State and defendant are entitled to offer evidence relating to the circumstances of the crime so that the sentencing jury will have essential background information 'to ensure that the jury acts from a base of knowledge in sentencing the defendant.' " *State v. Adkins,* 725 S.W.2d 660, 663 (Tenn.1987), quoting *State v. Teague,* 680 S.W.2d 785, 788 (Tenn.1984); *see also State v. Nichols,* 877 S.W.2d 722, 731 (Tenn.1994). On remand, that right should be afforded this defendant.

3. Disparity of Treatment of Co-Defendants

[27] The defendant next complains that he was entitled to an instruction informing the jury to consider, as a mitigating circumstance, the fact that Joe Baker had received a sentence less than death in exchange for his cooperation with authorities, despite the fact that he was equally blameworthy and had a prior history of criminal activity. Though not included in the special request, on appeal the defendant asserts that the jury should have been told about the disposition of the case with regard to Chris and Joel Hoosier as well. Again, we find no error with the trial court's denial of the instruction. The jury, during the course of the trial, did learn about Baker's prior criminal record and the fact that he had received a life sentence in exchange for his cooperation.

Moreover, the jury was told that Joel Hoosier had been granted immunity from prosecution and was informed that Chris Hoosier had not yet been tried. The catch-all instruction was given, which allowed the jury to consider any fact in evidence favorable to the defendant. There is no merit to this issue. On remand, however, the defense should not be precluded from presenting this information as part of the essential background necessary to an individualized sentencing determination.

4. Life Sentence Based on Mercy

Defendant next complains that the trial court erred in refusing to instruct the jury ***814** that it could sentence the defendant to life based on mercy and also challenges the constitutionality of the standard "no-sympathy" instruction used in this and other cases. We have repeatedly held that no error occurs when a trial court refuses to give a mercy instruction. *See State v. Hartman,* 703 S.W.2d 106, 119 (Tenn.1985); *State v. Melson,* 638 S.W.2d 342, 366 (Tenn.1982). We have also on numerous occasions upheld the "no-sympathy" instruction against constitutional attack. *See State v. Cazes,* 875 S.W.2d 253, 268 (Tenn.1994); *State v. Harris,*

839 S.W.2d 54, 75 (Tenn.1992). There is no merit to this issue.

5. Definition of Life and Death Sentence

Defendant also claims that he was entitled to an instruction informing the jury that a sentence of life means life and death means death. This Court has previously held that such an instruction is not required. *State v. Caughron,* 855 S.W.2d 526, 543 (Tenn.1993); *State v. Payne,* 791 S.W.2d 10, 21 (Tenn.1990).

6. Omission of the Beyond-a-Reasonable-Doubt Standard

[28] Equally without merit is the defendant's claim that the trial court erred by charging the jury according to the statute as it existed at the time of the offense in 1988, rather than according to the statute as amended in 1989 and in effect at the time of the trial in 1991. The instruction given tracked the language of the statute in effect at the time of the offense and required the jury to conclude that there were no mitigating circumstances sufficiently substantial to outweigh the aggravating circumstances before it could impose a sentence of death. *See* Tenn.Code Ann. § 39-2-203(g) (1982). The amended statute requires that, to impose a death sentence, the jury must find that the aggravating circumstances proven by the State outweigh, beyond a reasonable doubt, any mitigating circumstances. *See* Tenn.Code Ann. § 39-13-204(g) (1991).

We recently held in *State v. Brimmer,* 876 S.W.2d 75, 81-82 (Tenn.1994), that where an offense is committed before November 1, 1989, the effective date of the 1989 amendment changing the weighing standard, but where the trial and sentencing occur after that effective date, a trial court does not err by instructing the jury under the statute as it existed at the time the offense was committed. Here, under the rationale of *Brimmer,* because the offense occurred in December of 1988, instructing the jury according to the pre-1989 statute was appropriate. This issue is without merit.

7. Meaning and Function of Mitigating Circumstances

Defendant also faults the trial court for failing to inform the jury as to the meaning and function of mitigating circumstances. We have previously rejected the argument that such an instruction is required. *See State v. Brimmer,* 876 S.W.2d at 83; *State v. Groseclose,* 615 S.W.2d 142, 147-48 (Tenn.1981).

8. Violation of Mills v. Maryland

The defendant lastly alleges that there is a reasonable likelihood that the jury could have understood the instruction given in this case as requiring that it unanimously agree on the existence of mitigating circumstances in violation of the holdings of *Mills v. Maryland,* 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988). This Court has previously rejected the same argument and we reaffirm those holdings and find this issue without merit. *See e.g., State v. Nichols,* 877 S.W.2d at 734-35; *State v. Harris,* 839 S.W.2d 54, 74 (Tenn.1992); *State v. Bates,* 804 S.W.2d 868, 882 (Tenn.1991).

C. Middlebrooks Error

[29] Sometime after the trial of this case, a Court majority concluded in *State v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992) (Drowota and O'Brien, JJ., dissenting), that, when a defendant is convicted of felony murder, the State's use of felony murder as an aggravating circumstance at the sentencing hearing violates Article I, Section 16, of the Tennessee Constitution and the Eighth Amendment of the federal constitution because the aggravating circumstance is a duplication of the crime itself and does not narrow the class of death-eligible defendants ***815** as is constitutionally required. This Court, as presently constituted, has reconsidered the *Middlebrooks* holding, and a majority today re-affirms the principle announced in *Middlebrooks.* Therefore, it is indisputable that the sentencing jury's consideration of the invalid felony-murder aggravating circumstance in this case was state constitutional error. Because unrelated error requires a remand for a new sentencing hearing in this case, it is not necessary that we determine whether the *Middlebrooks* error was harmless beyond a reasonable doubt. *See State v. Howell,* 868 S.W.2d 238 (Tenn.1993). At the new sentencing hearing, however, the State may not rely on the felony murder aggravating circumstance.

Although conceding its inapplicability to this case, the dissent argues that the Tennessee first degree murder statute, as amended in 1989, is a constitutionally valid narrowing device. According to the dissent, inclusion of the term "reckless" within the substantive definition of the offense of first-degree murder, combined with a judicial construction of the statute to require defendants to have participated in a substantial way in the underlying felony, comports with the proportionality requirement enunciated by the United States Supreme Court in *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), and *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987), and, therefore, accomplishes narrowing.

Initially, we point out that the Court majority in *Middlebrooks* considered the effect of the 1989 amendment and rejected the arguments that the dissent now advances as novel. *See State v. Middlebrooks,* 840 S.W.2d at 345. Moreover, the "saving construction" urged by the dissent is not consistent with the well-established rule that:

> Criminal statutes must be strictly interpreted, both with respect to the act charged as the offense and the penalty imposed. It is axiomatic that statutes creating and defining crimes cannot be extended by intendment. Before a man can be punished, his case must be plainly and unmistakably within a statute. As liberty and perhaps life are involved, every reasonable doubt must be resolved in favor of the defendant.

State ex rel. Inman v. Brock, 622 S.W.2d 36, 46 (Tenn.1981), quoting 1*Wharton's Criminal Law And Procedure* § 19 (12 Ed.1957).

Accordingly, we disagree with the analysis

employed by the dissent; however, even assuming, for purposes of argument and of federal constitutional law, that the finding required by *Tison* is sufficient narrowing, for the reasons stated below it is not sufficient as a matter of state constitutional law.

The defendant here, as was the case in *Middlebrooks,* was convicted of felony-murder under the pre-1989 law which defined first-degree murder as follows:

> Every murder perpetrated by means of poison, lying in wait, or by other kinds of willful, deliberate, malicious, and premeditated killing, or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb....

Tenn.Code Ann. § 39-13-202(a) (1982 & Supp.1988) (emphasis added).

In 1989, the statute was amended to define first-degree murder as:

> (2) A *reckless* killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, or aircraft piracy; [or]
>
> (3) A *reckless* killing of another committed as the result of the unlawful throwing, placing, or discharging of a destructive device or bomb[.]

Tenn.Code Ann. § 39-13-202(a)(2) and (3) (1991).

The word "reckless" is defined as:

> the actions of one who acts recklessly with respect to circumstances surrounding the conduct or the result of the conduct when the person is aware of but consciously disregards a substantial and unjustifiable risk that the circumstances exist or the result will occur. The risk must be of such a nature and degree that its disregard ***816** constitutes a gross deviation from the standard of care that an ordinary person would exercise under all the circumstances as reviewed from the accused person's standpoint.

Tenn.Code Ann. § 39-11-106(a)(31) (1991).

The dissent asserts that the legislative insertion of the term "reckless" into the substantive definition of first-degree felony murder in combination with a judicial interpretation of the statute to require substantial participation, accomplishes narrowing under the principles announced in *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), *Enmund,* and *Tison, supra.*

Certainly, the United States Supreme Court in *Lowenfield* established that states may accomplish constitutional narrowing either by providing restrictive definitions of first-degree or capital murder or by utilizing aggravating circumstances at the sentencing hearing. As we stated in *Middlebrooks,* however, Tennessee has not chosen to narrow at the definitional stage. In fact, prior to 1989 Tennessee was a felony murder simpliciter state--one of only five with the broadest definition of first degree felony murder.

We also said in *Middlebrooks,* that "since the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully further narrow the class of death-eligible defendants." *State v. Middlebrooks,* 840 S.W.2d at 345. Accordingly, unlike the dissent, we do not consider it "irrelevant as a matter of federal constitutional law" that the felony murder aggravating circumstance duplicates the elements of the underlying offense.

Moreover, assuming for argument's sake that, as a matter of federal constitutional law, the dissent is correct in asserting that minimal narrowing is accomplished by defining first-degree felony murder to require a *mens rea* of recklessness, that is not sufficient narrowing to satisfy Article I, Section 16, of the Tennessee Constitution. This is so because all felony murderers potentially meet a recklessness standard and all are, therefore, potentially eligible for the death penalty. Compliance with Article I, Section 16 requires that the class of persons *eligible* for the death penalty be genuinely narrowed to justify imposition of a more severe sentence on the defendant as compared to others found guilty of murder. *State v. Middlebrooks,* 840 S.W.2d at 345.

When a defendant is convicted of first-degree felony murder, genuine narrowing as required by Article I, Section 16, is not accomplished by Tennessee's broad definition of first-degree felony murder. Thus, we reaffirm our holding in *Middlebrooks* that, when a defendant is convicted of first-degree felony murder, the aggravating circumstance set out in Tenn.Code Ann. § § 39-2-203(i)(7) (1982) and 39-13-204(i)(7) (1991), which merely duplicates the elements of the offense and does not accomplish genuine narrowing as required by Article I, Section 16, of the Tennessee Constitution, may not be relied upon by the State to seek imposition of the death penalty.

We also disagree with the dissent's position that our holding in *Middlebrooks* was not based on independent and adequate state grounds. Although federal authority was considered and discussed in our analysis, primary reliance for our interpretation of Article I, Section 16, of the Tennessee Constitution in *Middlebrooks* was placed upon similar decisions from North Carolina and Wyoming. *See State v. Middlebrooks,* 840 S.W.2d at 341-43 (citing and discussing *State v. Cherry,* 298 N.C. 86, 257 S.E.2d 551 (1979) and *Engberg v. Meyer,* 820 P.2d 70 (Wyo.1991)). In addition, we also relied upon Tennessee statutes that prohibit duplication in non-capital sentencing and concluded that Article I, § 16, imposed the same prohibition in capital cases. *State v. Middlebrooks,* 840 S.W.2d at 341 (citing Tenn.Code Ann. § 40-35-111 (1982) and § 40-35-114 (1990)). Simply put, the *Middlebrooks* decision was based adequately and independently on the Tennessee Constitution. We continue to adhere to its mandate.

D. Chronological Order

[30] The defendant next avers that the district

attorney general deliberately delayed the trial of this offense in Sumner County *817 until after the trial in the Montgomery County case to provide an aggravating circumstance. The defendant contends that allowing a prosecutor the discretion to organize the order of trials violates his due process rights. We disagree. As we recently decided in *State v. Nichols, supra,* "[f]or purposes of this aggravating circumstance, [previous conviction of felony involving violence], the order in which the crimes were actually committed is irrelevant so long as the convictions have been entered before the sentencing hearing at which they were introduced." 877 S.W.2d at 736. This issue is without merit.

CONCLUSION

We have carefully considered the defendant's contentions as to alleged errors occurring during the guilt phase of the trial and conclude that none have merit. The conviction is affirmed.

We have determined that the cumulative effect of errors occurring during the sentencing phase, including improper prosecutorial argument and the admission of irrelevant evidence, was prejudicial and more probably than not affected the sentence imposed. Accordingly, the sentence of death must be reversed and the case remanded for a new sentencing hearing. All aspects of the new sentencing hearing should be conducted in conformity with this Opinion.

Because of the remand for resentencing, we pretermit statutory review of the proportionality of the death sentence imposed against the defendant as otherwise required by Tenn.Code Ann. § 39-13-206(c)(1)(D) (1991) [formerly Tenn.Code Ann. § 39-2-205(c)(4)], and decline to address the defendant's challenges to the death penalty statute, all of which have been repeatedly and recently rejected by a majority of this Court.

BIRCH, J., concurs.

REID, J., concurs with separate opinion.

O'BRIEN, C.J. and DROWOTA, J., concur and dissent with separate opinions.

REID, Justice, concurring.

The procedure in Tennessee whereby the sentence of death is executed consists of three steps. *See State v. Howell,* 868 S.W.2d 238, 265 (Tenn.1993) (Reid, C.J., concurring). This case involves only the first two steps, which are not clearly delineated in the concurring and dissenting opinions.

The first step is the determination that the person to be executed is a member of the class of death-eligible murderers. Under the federal constitution a sentence of death may be imposed only,

> where a defendant kills, attempts to kill, or intends that a killing take place, or that lethal force will be imposed, or where a defendant's personal involvement in the underlying felony is substantial and who exhibits a reckless disregard or indifference to the value of human life. *Tison v. Arizona,* 481 U.S. 137, 157-158, 107 S.Ct. 1676, 1688, 95 L.Ed.2d 127 (1987); *Enmund v. Florida,* 458 U.S. 782, 797, 102 S.Ct. 3368, 3377, 73 L.Ed.2d 1140 (1982); *State v. Branam,* 855 S.W.2d 563, 570-71 (Tenn.1993); *State v. Middlebrooks,* 840 S.W.2d 317, 338 (Tenn.1992).

State v. Howell, 868 S.W.2d 238, 265 (Tenn.1993) (Reid, C.J., concurring). Prior to the 1989 amendment to T.C.A. § 39-13-202, that statute, which defines first degree murder, did not include the "reckless disregard" provision of the definition found to be essential in *Tison v. Arizona. See* T.C.A. § 39-2-202 (1982). The 1989 amendment only conformed the statute to the minimum standard of death-eligible defendants required by the United States Constitution. Tennessee's first degree murder statute, as amended in 1989, remains the most unrestricted definition of a class of death-eligible defendants permitted under the federal constitution. (FN1) *State v. Middlebrooks,* 840 S.W.2d 317, 337-38, *cert. dismissed,* 510 U.S. 124, 114 S.Ct. 651, 126 L.Ed.2d 555 (1993).

The federal constitution does not permit all death-eligible defendants to be executed. It requires that states adopt procedures for *818 selecting from among the death-eligible class, those for whom the sentence of death is most appropriate. *Gregg v. Georgia,* 428 U.S. 153, 187-95, 96 S.Ct. 2909, 2932-35, 49 L.Ed.2d 859 (1976). Therefore, in Tennessee a second step is necessary. Tennessee accomplishes this second step by the application of enhancing and mitigating factors at the sentencing phase of the trial. *See* T.C.A. § 39-13-204(i), (j) (Supp.1994).

However, some states, unlike Tennessee, combine the first and second steps in a restrictive statutory definition of capital murder. The decision in *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1987), was based upon a restrictive statutory definition of capital murder. In *Lowenfield,* the United States Supreme Court, after stating the result mandated by the constitution, described two methods which could be used to accomplish that result:

> To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens,* 462 U.S. 862, 877, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. By doing so, the jury narrows the class of persons eligible for the death penalty according to an objective legislative definition.
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> It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses, as Texas and Louisiana have done, so that the jury finding of

guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase.

Here, the "narrowing function" was performed by the jury at the guilt phase when it found defendant guilty of three counts of murder under the provision that "the offender has a specific intent to kill or to inflict great bodily harm upon more than one person."

Id. 484 U.S. at 246, 108 S.Ct. at 554-55 (citations omitted). First degree murder in Louisiana, when *Lowenfield* was decided, required the finding of specific intent. *Id.* 484 U.S. at 241-43, 108 S.Ct. at 553. The culpability of the defendant in *Lowenfield* is similar to that of a defendant in Tennessee who is convicted of premeditated murder (T.C.A. § 39-13-202(a)(1)) and found at sentencing to have knowingly created a great risk of death to two or more persons other than the victim (T.C.A. § 39-13-204(i)(3)).

There is no "interaction of the principles" found in *Lowenfield* and *Enmund* and *Tison* 2. The class of death-eligible defendants defined in *Enmund* and *Tison* is not restricted or narrowed by the 1989 amendment to T.C.A. § 39-13-202(a). Further narrowing, by statute as in *Lowenfield,* or by the use of aggravating circumstances as in Tennessee, is constitutionally required before the sentence of death can be executed. The 1989 amendment to the Tennessee statute did not alter the constitutional principles on which *Middlebrooks* was based and provides no support for the proposition that this Court should retreat from the carefully crafted decision in *Middlebrooks*.

O'BRIEN, Chief Justice, concurring and dissenting.

While I agree in principle with the concurring and dissenting opinion by my colleague, Justice Drowota, I write separately to express my personal disagreement with the majority opinion in *State v. Middlebrooks,* 840 S.W.2d 317 (Tenn.1992). *Middlebrooks* held it to be in violation of the Tennessee Constitution, Article I, § 16, to use the felony murder aggravating circumstance, T.C.A. § 39-2-203(i)(7) (1982) or T.C.A. § 39-13-204(i)(7) (1991), to sustain imposition of the death penalty for a conviction of felony murder, although it can be used to support imposition ***819** of the death penalty for premeditated murder. It was held that the use of the felony murder aggravating circumstance duplicated the elements of the underlying crime and failed to narrow the class of death-eligible murders as required by Article I, § 16 of the Tennessee Constitution. Since the Eighth Amendment of the United States Constitution and Article I, § 16 of the Tennessee Constitution are identical in language, it is incomprehensible to me how the use of the felony murder aggravating circumstance which duplicated the elements of the underlying crime could be construed to be constitutional under the United States Constitution and not under the Tennessee Constitution.

In this case defendant was found guilty of the offense of first degree felony murder in an attempt to perpetrate a robbery. The lead opinion mandates reversal for, among other reasons, the use of the felony murder aggravating circumstance, which was held to be error in the *Middlebrooks* case.

In *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), a case based on the Louisiana capital sentencing statute, the petitioner raised fundamentally the same charge of error under consideration here, that is that the sole aggravating circumstance found at the jury sentencing phase was identical to an element of the capital crime for which he was convicted. Louisiana has a very similar narrowing statute as that created by the legislature in this State. Tennessee has established five (5) statutory grades of homicide: First Degree Murder; Second Degree Murder; Manslaughter, Voluntary and Involuntary; and Vehicular Homicide. The punishments for these offenses are graded according to the nature of the offense. First degree murder is defined so as to include only a narrow class of homicide, the punishment for which is death or imprisonment for life with the sentence to be fixed by the jury in a separate sentencing hearing to determine which shall apply upon a finding of guilt. A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstance exists and outweighs any mitigating circumstance the jury may find. Otherwise the sentence shall be life imprisonment.

In discussing the exact same issue we have before us the *Lowenfield* court said:

"It seems clear to us from this discussion that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: The legislature may itself narrow the definition of capital offenses as Texas and Louisiana have done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase ... Here the 'narrowing function' was performed by the jury at the guilt phase when it found defendant guilty of three (3) counts of murder under the provision that the 'offender had a specific intent to kill or to inflict great bodily harm upon more than one (1) person.' ... The fact that the sentencing jury is also required to find the existence of an aggravating circumstance in addition is no part of the constitutionally required narrowing process, and so the fact that the aggravating circumstance duplicated one of the elements of the crime does not make this sentence constitutionally infirm. There is no question but that the Louisiana scheme narrows the class of death-eligible murderers and then at the sentencing phase allows for the consideration of mitigating circumstances in the exercise of discretion. (FN1) The Constitution requires no more."

The Legislature in this State has further narrowed the sentencing process in cases in which a sentence of death has been imposed. The statutes provide that the sentence of death is automatically reviewed by this Court even though a defendant convicted of first degree murder does not appeal the conviction. T.C.A. § 39-13-206. The Court first considers assigned errors and then proceeds to review the

sentences of death. The statute requires the Court to determine whether (1) the sentence of death was imposed in any arbitrary fashion; (2) the evidence supports the jury's finding of statutory aggravating ***820** circumstance or circumstances; (3) the evidence supports the jury's finding that the aggravating circumstance or circumstances outweigh any mitigating circumstances; (4) the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the nature of the crime and the defendant. In addition to its other authority regarding correction of errors, the Court, in reviewing the death sentence for first degree murder, is authorized to: (A) affirm the sentence of death; or (B) modify the punishment to life imprisonment.

I am satisfied that the judgment in this case meets both State and federal constitutional requirements. Insofar as the narrowing function is concerned. Otherwise, I concur in Justice Drowota's concurring and dissenting opinion.

DROWOTA, Justice, concurring and dissenting.

I concur with part I, Sections A-F of the majority opinion.

I agree that this case must be remanded to the trial court for resentencing because of the prosecutorial misconduct; therefore, I concur in Part II-A of the majority opinion. However, I respectfully dissent from Part II-C of that opinion, in which the Court reaffirms its *State v. Middlebrooks,* 840 S.W.2d 317, 346 (Tenn.1992) holding that when a defendant is convicted of felony murder, the State's use of the felony murder aggravating circumstance to impose the death penalty violates Art. I, § 16 of the Tennessee Constitution because the aggravating circumstance duplicates the elements of the underlying offense and thus fails to "narrow" the class of death-eligible offenders. Although I filed a dissent in *Middlebrooks,* I wish here to further develop the grounds on which I believe the holding of the *Middlebrooks* majority to be in error.

DISCUSSION OF RELEVANT UNITED STATES SUPREME COURT CAPITAL PUNISHMENT JURISPRUDENCE

The capital punishment jurisprudence of the United States Supreme Court since its landmark decision in *Furman v. Georgia,* 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) may be described in terms of two overarching objectives. First and foremost, the Supreme Court has sought to *standardize* capital sentencing schemes by requiring the States to formulate clear standards to guide and limit the sentencing body's discretion in imposing the death penalty. This process of standardization is intended to "minimize the risk of wholly arbitrary and capricious action" by the sentencing body in its determination of whether to impose the death penalty. *Gregg v. Georgia,* 428 U.S. 153, 189, 96 S.Ct. 2909, 2933, 49 L.Ed.2d 859 (1976); *see also Proffitt v. Florida,* 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976). Second, the Court has sought to *individualize* capital sentencing schemes by requiring the States to allow the sentencing body full access to any evidence that might serve to assist in the sentencing determination, such as evidence of the defendant's character and the circumstances of the crime. *See Eddings v. Oklahoma,* 455 U.S. 104, 110-12, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 601-605, 98 S.Ct. 2954, 2963-2965, 57 L.Ed.2d 973 (1978); *Roberts (Harry) v. Louisiana,* 431 U.S. 633, 636-37, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977). This process of individualization serves to increase the sentencing body's discretion. *See generally* Stephen Gillers, *Deciding Who Dies,* 129 U.Pa.L.Rev. 1 (1980).

The Supreme Court has stated in several opinions that the standardization of the States' capital sentencing schemes serves the function mandated by the Eighth Amendment of "narrowing" the class of death-eligible offenders; in other words, standardization serves to circumscribe the unfettered discretion that existed in the sentencing body prior to *Furman. Zant v. Stephens,* 462 U.S. 862, 876-77, 103 S.Ct. 2733, 2742, 77 L.Ed.2d 235 (1983). A proper "narrowing device" must accomplish two distinct objectives. First, it must provide standards that are sufficiently determinate to guide and channel the sentencing body's discretion. *Arave v. Creech,* 507 U.S. 463, ----, ----, 113 S.Ct. 1534, 1540-41, 123 L.Ed.2d 188 (1993); *Shell v. Mississippi,* 498 U.S. 1, 111 S.Ct. 313, 112 L.Ed.2d 1 (1990); *Walton v. Arizona,* 497 U.S. 639, 653, 110 S.Ct. 3047, ***821** 3057, 111 L.Ed.2d 511 (1990); *Lewis v. Jeffers,* 497 U.S. 764, 774, 110 S.Ct. 3092, 3099, 111 L.Ed.2d 606 (1990); *Maynard v. Cartwright,* 486 U.S. 356, 363-64, 108 S.Ct. 1853, 1858-59, 100 L.Ed.2d 372 (1988); *Godfrey v. Georgia,* 446 U.S. 420, 428, 100 S.Ct. 1759, 1765, 64 L.Ed.2d 398 (1980). The fact that the narrowing device is determinate, however, does not end the inquiry because the device must also provide a principled basis for distinguishing those defendants convicted of murder who deserve capital punishment from those who do not. *Arave,* 507 U.S. at ----, 113 S.Ct. at 1542. If the narrowing device is so broad that it could be interpreted by the sentencing body to apply to every murder, it is not constitutionally valid. *Cartwright,* 486 U.S. at 364, 108 S.Ct. at 1859; *Godfrey,* 446 U.S. at 428-29, 100 S.Ct. at 1765.

The Supreme Court has afforded the States a significant amount of flexibility in fashioning devices to narrow the class of death-eligible offenders. The Court's decision in *Lowenfield v. Phelps,* 484 U.S. 231, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988), exemplifies this commitment to federalism in the realm of capital punishment jurisprudence. In *Lowenfield,* the petitioner was convicted under Louisiana's murder statute, which enumerates a narrowly defined "laundry-list" of first-degree murders. La.Rev.Stat.Ann. § 14:30 A (West 1986). The subsection under which the petitioner was convicted defined first-degree murder as the killing of a human being "when the offender has a specific intent to kill or inflict great bodily harm upon more than one person." La.Rev.Stat.Ann. § 14:30 A(3). After a separate sentencing hearing, the jury found a sole aggravating circumstance--that "the offender knowingly created a risk of death or great bodily harm to more than one person," La.Code Crim.Pro.Ann. Art. 905.4(d)--and sentenced the petitioner to death. Because Louisiana law provided that these provisions were to be construed in a "parallel

fashion," *see State v. Williams,* 480 So.2d 721, 726-27 (La.1985), there was no dispute that evidence supporting a conviction under § 14:30 A(3) automatically established the aggravating circumstance enumerated in Article 905.4 of the Louisiana Code of Criminal Procedure.

The petitioner challenged his conviction, arguing that because the sole aggravating circumstance found by the jury duplicated the elements of the underlying offense, Louisiana's capital sentencing scheme failed to meaningfully narrow the class of death-eligible offenders as required by the Eighth Amendment. A six-member majority of the Court rejected this argument, holding that Louisiana's "laundry-list" of first-degree murders satisfied the narrowing requirement of the Eighth Amendment because it rationally and meaningfully differentiated between the defendants who deserved capital punishment and those who did not. This holding therefore obviated Louisiana's entire scheme of aggravating circumstances as a matter of federal constitutional law. The majority stated its holding as follows:

> It seems clear to us ... that the narrowing function required for a regime of capital punishment may be provided in either of these two ways: the legislature may itself narrow the definition of capital offenses, as ... Louisiana ha[s] done, so that the jury finding of guilt responds to this concern, or the legislature may more broadly define capital offenses and provide for narrowing by jury findings of aggravating circumstances at the penalty phase [citation omitted].
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> *Lowenfield,* 484 U.S. at 246, 108 S.Ct. at 555.

To further emphasize its holistic view of the narrowing function, the Court stated:

> *The use of aggravating circumstances is not an end in itself, but a means of narrowing the class of death-eligible persons and thereby channeling the jury's discretion. We see no reason why this narrowing function may not be performed by jury findings at either the sentencing phase of the trial or the guilt phase.*
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> *Lowenfield,* 484 U.S. at 244-45, 108 S.Ct. at 554 (emphasis added).

With these fundamental principles of the narrowing function required by the Eighth Amendment clearly in mind, we now turn to an examination of the Supreme Court's application of these principles to the felony murder doctrine. Two cases-- *Enmund v. Florida,* 458 U.S. 782, 102 S.Ct. 3368, 73 L.Ed.2d ***822** 1140 (1982), and *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987)--are crucial for a proper resolution of the issue addressed by the Court in *Middlebrooks.*

In *Enmund* the petitioner was convicted under the Florida felony-murder statute because of his involvement in a robbery in which an elderly couple was killed. The record in the case revealed that petitioner Earl Enmund drove Sampson and Jeannette Armstrong to the home of Thomas and Eunice Kersey and remained in the car while the Armstrongs knocked on the door. When Thomas Kersey appeared, the Armstrongs grabbed him and demanded his money. Mr. Kersey then yelled for help, and Eunice Kersey came out of the house with a shotgun. She fired the gun at Jeannette Armstrong and wounded her. At that point, Sampson and possibly Jeanette Armstrong shot and killed both the Kerseys, took their money, and fled. Although the evidence established that Earl Enmund drove the Armstrongs away from the scene of the crime, there was no evidence that he knew that the Armstrongs had intended to kill the Kerseys.

Under the Florida felony murder statute and capital punishment sentencing scheme, a defendant found guilty of felony murder could be put to death without any proof whatsoever as to his mental state. The jury found Enmund guilty of felony murder, and it recommended that he be put to death; the trial court accepted this recommendation. The Florida Supreme Court affirmed the conviction and sentence of death.

Before the United States Supreme Court, Enmund argued that the Eighth and Fourteenth Amendments prohibited a State from imposing the death penalty on a person convicted of felony murder when that person did not kill, attempt to kill, intend to kill, or know that lethal force would be used. In determining whether the punishment was cruel and unusual, the Court first sought to identify the prevailing societal attitude as to whether the death penalty was an excessive sanction for felony murderers like Enmund by analyzing the actions of state legislatures and lay juries on the issue. After analyzing the states' felony murder and capital sentencing statutes, the Court found that only eight states allowed a person who was involved in a robbery in which a person was murdered to be sentenced to die simply for his involvement. The Court then surveyed the actions of juries in sentencing persons convicted of felony murder who did not themselves commit the murder, and discovered that only a tiny fraction of convicted felony murderers had been sentenced to death in the absence of evidence of their participation in the killing or a finding of intent to kill. With this evidence in mind, the Court conducted its own proportionality review and concluded that the legitimate goals of capital punishment--deterrence and retribution--were not served when a person convicted of felony murder is sentenced to death in the absence of proof that the person killed, attempted to kill, or intended that life would be taken. Specifically, the majority stated that because American criminal law has always insisted that punishment must be commensurate with the intent of the perpetrator, Florida's capital sentencing scheme was constitutionally deficient because it treated Enmund, who did not intend that a killing take place, in the same manner as the actors in the underlying felony who did intend to kill.

The Court returned to the theme of culpability in a felony murder situation five years later in *Tison v. Arizona,* 481 U.S. 137, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). In *Tison,* petitioners Ricky and Raymond Tison brought several concealed weapons into the Arizona State Prison to free Gary Tison, their father, who was serving time for the murder of a prison guard. The Tison brothers were successful in freeing their father and Randy Greenawalt, their father's cellmate. As the men were driving through the desert, a tire on their Lincoln automobile blew out. Raymond Tison then flagged down a Mazda,

which was occupied by John Lyons, his wife, and their young son and niece. The men forced the Lyons' family into the Lincoln and drove both cars off the road into the desert. At some point the men transferred their belongings to the Mazda; however, thereafter they parked the Mazda and continued to drive the Lincoln deeper into the desert. After stopping the Lincoln, ***823** Gary Tison ordered the Lyons' family out of the car. At that time, John Lyons begged the group not to kill them; and he asked that the group give them some water and leave them in the desert. Gary Tison responded to the plea by instructing Raymond and Ricky Tison to return to the Mazda and get some water. As Ricky and Raymond Tison returned with the container of water, Gary Tison and Greenawalt opened fire on the Lyons' family, killing all four. There was no dispute that both Ricky and Raymond Tison saw the murders and did nothing to assist the victims. The group continued their escape attempt in the Mazda until they were apprehended several days later by a police roadblock.

Both Raymond and Ricky Tison were convicted under the Arizona felony murder statute and were sentenced to death; and the Arizona Supreme Court affirmed the convictions. The Tisons then collaterally attacked the convictions in post-conviction proceedings, arguing that the Supreme Court's decision in *Enmund v. Florida* required their convictions to be reversed because they did not kill, attempt to kill, or intend that the victims be killed. A divided Arizona Supreme Court rejected this argument, holding that the *Enmund* "intent to kill" requirement had been satisfied because the Tisons intended, contemplated, or foresaw that life would be taken in the escape scheme.

The Supreme Court granted certiorari for the purpose of determining whether the death sentence was constitutionally valid under the dictates of *Enmund*. In its analysis, a five-member majority of the Court first disavowed the analysis employed by the Arizona Supreme Court; it stated that the Arizona court's definition of "intent" was more akin to "foreseeability" than to the traditional notion of specific intent as used in *Enmund*. And the majority conceded that the Tisons did not "intend to kill" as that concept had been traditionally understood. Therefore, it also conceded that petitioners did not fall within the category of felony murderers for whom the *Enmund* court explicitly held the death penalty to be constitutionally permissible.

That admission, however, did not settle the issue because the majority went on to state that the Tisons also did not fit within the category of felony murderers for whom the *Enmund* court had held the death penalty to be constitutionally impermissible: those felony murderers who, like Enmund, had not participated in the crimes in a major way and who had no culpable mental state. The Court contrasted petitioners' actions of securing the weapons, participating in the jailbreak, trapping the victims, and failing to help them in the face of their impending death with Enmund's comparatively innocuous role as the driver of the "getaway" car. Because it believed that the Tisons' actions could be construed as exhibiting a reckless indifference to human life, the Court recast the issue as whether the Eighth Amendment prohibits the imposition of the death penalty upon a person convicted of felony murder who has exhibited recklessness and whose participation in the underlying felony can be said to have been major rather than minor.

The majority answered this question in the negative. After surveying the state felony murder and capital punishment statutes, the court held that only a small minority--eleven states--forbade the imposition of the death penalty where the defendant acted with recklessness and played a substantial role in the underlying felony. The majority then specifically addressed the culpability issue that was so essential to the holding in *Enmund*. Although it agreed with the *Enmund* court that punishment must be closely tailored to the culpable mental state of the perpetrator, the majority rejected petitioners' argument that only a classic intentional, premeditated murder is deserving of the death penalty. Justice O'Connor, writing for the majority, reasoned as follows:

> A narrow focus on the question of whether or not a defendant "intended to kill," however, is a highly unsatisfactory means of definitively distinguishing the most culpable and dangerous of murderers. Many who intend to, and do, kill are not criminally liable at all--those who act in self-defense or with other justification or excuse. Other intentional homicides, though criminal, are often felt undeserving of the death penalty--those that are the result of provocation. ***824** On the other hand, some nonintentional murderers may be among the most dangerous and inhumane of all--the person who tortures another not caring whether the victim lives or dies, or the robber who shoots someone in the course of a robbery, utterly indifferent to the fact that the desire to rob may have the unintended consequence of killing the victim as well as taking the victim's property. This reckless indifference to the value of human life may be every bit as shocking to the moral sense as an "intent to kill." Indeed it is for this very reason that the common law and modern criminal codes alike have classified behavior such as occurred in this case along with intentional murders [citation omitted]. *Enmund* held that when "intent to kill" results in its logical though not inevitable consequence--the taking of human life--the Eighth Amendment permits the State to exact the death penalty after a careful weighing of the aggravating and mitigating circumstances. Similarly, we hold that the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes its natural, though also not inevitable, lethal result.
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> We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here. Rather, *we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement.*

Tison, 481 U.S. at 157-58, 107 S.Ct. at 1687-88

(emphasis added).

Several principles can be derived from the *Lowenfield, Enmund,* and *Tison* decisions. First, it is clear that a State need not employ a scheme of aggravating circumstances in order to fulfill the narrowing mandate of the Eighth Amendment; that mandate can be fulfilled by a narrow definition of the offenses themselves if the offenses are both sufficiently determinate and provide a principled basis for differentiating between convicted persons who deserve capital punishment and those who do not. Moreover, it is abundantly clear after *Tison* that the death penalty may be imposed in a felony murder situation if the defendant exhibits recklessness and plays a substantial role in the underlying felony.

PART I

In *Middlebrooks,* I applied these principles to our felony murder aggravating circumstance, Tenn.Code Ann. § 39-13-204(i)(7), (FN1) which, like the first degree murder statute that included felony murder, Tenn.Code Ann. § 39-13-202(a), (FN2) was at that time (1987) unqualified by either the culpability or participation requirements of *Tison.* Although this deficiency did serve to deprive the jury of the opportunity to decide whether the felony murder aggravating circumstance, as modified by the *Tison* requirements, applied in a defendant's case (because the jury was not informed of the *Tison* requirements in the charge), I did not believe this was sufficient to render the aggravating circumstance unconstitutional because I felt that any constitutional error made by the jury in applying the open-ended felony murder aggravating circumstance could be corrected by this Court on direct appeal. *Middlebrooks,* 840 S.W.2d at 349. Moreover, because we had rejected essentially the same argument as ***825** that propounded by Middlebrooks in *State v. Smith,* 755 S.W.2d 757, 768 (Tenn.1988), a post- *Tison* case, I believed that the doctrine of stare decisis demanded that we adhere to the position previously taken on this issue. *Id.* at 347. Because I continue to believe that the felony murder aggravating circumstance is constitutional, even when it and the definition of felony murder are unqualified by any culpability or participation requirement, I dissent from the holding in Part II-C of the majority opinion.

PART II

As stated above, I still believe that my *Middlebrooks* dissent was correct because of the doctrine of stare decisis; and I also think that it was a correct analysis of federal constitutional law. However, I wish here to set forth another argument which, although not specifically applicable to the case at hand, (FN3) even more strikingly illustrates the fallacy of the *Middlebrooks* majority's conclusion that our felony murder aggravating circumstance violates Art. I, § 16 of the Tennessee Constitution because it duplicates the elements of the underlying offense.

In 1989 the General Assembly amended § 39-13-202(a) by defining as first degree murder:

(2) A *reckless* killing of another committed in the perpetration of, or attempt to perpetrate any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, or aircraft piracy; [or]

(3) A *reckless* killing of another committed as the result of the unlawful throwing, placing, or discharging of a destructive device or bomb[.]

Tenn.Code Ann. § 39-13-202(a)(2) and (3) (emphasis added).

The legislative insertion of "recklessness" into the felony murder portions of § 39-13-202(a) is crucial because the interaction of the principles announced in *Lowenfield, Enmund,* and *Tison* appears to lead inexorably to one conclusion: that a definition of felony murder which includes the *Tison* requirements of recklessness and a substantial degree of participation in the underlying felony is a constitutionally valid narrowing device because it is both determinate and because it provides a principled basis for distinguishing between those defendants who deserve to die and those who do not. As to the determinacy prong of the test, there is no question that such a definition is sufficiently determinate to guide and channel the sentencing body's discretion--this is especially apparent when a *Tison*-type definition of felony murder is contrasted with the types of narrowing devices that have been held to be unconstitutionally vague. See cases cited on p. 3-4, *supra.* As to the second prong of the test, Justice O'Connor's opinion in *Tison* explains with remarkable lucidity and power the reasons that such a definition does provide a rational, meaningful method of separating those defendants who deserve the death penalty from those who do not. Felony murderers who recklessly engage in criminal activity that poses grave danger to others may be much more dangerous to society than some intentional murderers. I am in total agreement with Justice O'Connor's vigorous rejection of the simplistic view that only intentional or premeditated murders are deserving of the death penalty. *See Middlebrooks,* 840 S.W.2d at 347.

This does not settle this question, however, for while Tennessee's current definition of felony murder obviously includes the culpability requirement set forth in *Tison,* it does not include the second requirement of *Tison* --that the defendant's participation in the felony have been substantial. Therefore, standing alone, the statute does not seem to satisfy the dictates of *Tison* and therefore does not qualify as a constitutionally valid narrowing device.

However, it is a well-settled rule of statutory construction that a court may, indeed must, apply a saving construction to a statute of questionable constitutionality if the saving construction is rational and is within the realm of the intent of the legislature. *State v. Lyons,* 802 S.W.2d 590 (Tenn.1990); *State ex rel Maner v. Leech,* 588 S.W.2d 534 (Tenn.1979). Because the General Assembly ***826** amended the felony murder statute in 1989 by inserting the word "reckless," it is obvious that the legislature was attempting to ensure the constitutionality of the statute by conforming it to the dictates of *Tison.* Therefore, given the legislature's intent in amending the statute, it is but a small step to construe the statute to require the

defendant to have participated in a substantial way in the underlying felony before he can be convicted of felony murder and therefore become death-eligible. Therefore, I would construe the statute in that manner. And I would require that the jury be charged to that effect.

With the aid of the above mentioned saving construction, I believe that § § 39-13-202(a)(2) and (3) constitute a valid narrowing device under federal constitutional law. While this conclusion does not end the inquiry as a matter of state constitutional law, it is of tremendous persuasive force, particularly since we have rejected more restrictive approaches to this issue in the past while deferring to the pronouncements of the Supreme Court. *See e.g., State v. Smith,* 755 S.W.2d 757, 768 (Tenn.1988).

I believe that when considered in light of my argument dealing with the 1989 amendment to the first degree murder statute, the weakness of the *Middlebrooks* majority's analysis of the relevant federal law becomes apparent. A primary reason for this conclusion is the majority's treatment of the *Tison* decision. Although the majority realized that *Tison* provided a "nationwide threshold of culpability at the reckless indifference level, meaning that a defendant who acts without reckless indifference is not constitutionally eligible for the death penalty," *Middlebrooks,* 840 S.W.2d at 345, it went on to say that the *Tison* requirement (the majority did not mention the participation factor also mandated by *Tison*) did not serve the narrowing function required by the Eighth Amendment because

> [a]ll felony murderers ... potentially meet a recklessness standard; that is, one who purposely undertakes a felony that results in a death, almost always can be found reckless. Therefore, the narrowing devices in these states [states requiring proof of recklessness before the defendant can become death-eligible] are essentially no different from those in pure felony murder states.

Id. at 345.

The majority concluded its argument by stating: "[t]herefore, since the absence of reckless indifference constitutionally immunizes a defendant from the death penalty, its presence cannot meaningfully *further* narrow the class of death eligible offenders." *Id.* (emphasis added).

This analysis is flawed in two principal ways. Initially, the majority's assertion that all or "almost all" felony murderers can be found to be reckless--a proposition for which it cited no authority--is simply not the case. As *Tison* itself illustrated, there are felony murderers, such as the petitioner in *Enmund,* who cannot be found to have been reckless, and those defendants are constitutionally immunized from the punishment of death. Thus, the restrictive definition of felony murder in our first degree murder statute does narrow, to some extent, the class of death-eligible defendants.

Second, my argument pertaining to the 1989 amendment of the first degree murder statute substantially undermines another main pillar of the *Middlebrooks* majority's analysis--its argument that the felony murder aggravating circumstance does not *further* narrow the class of death-eligible defendants. Although the majority acknowledged that under *Lowenfield* a State is not required to further narrow the class of death-eligible defendants with the use of aggravating circumstances if it has already adequately narrowed that class by restrictively defining the capital offenses, it determined that *Lowenfield* was inapplicable because while Louisiana had narrowly defined its capital offenses, "Tennessee has a broad definition of murder and has not narrowed in the definitional stage." *Id.* at 346. While the majority is correct that Tennessee does not have a comprehensive scheme of narrowly defined capital offenses as does Louisiana, this fact is immaterial because Tennessee's 1989 definition of felony murder, when construed as I have urged in this dissent, *is* an acceptable narrowing device under the Eighth Amendment. ***827** Therefore, the fact that the felony murder aggravating circumstance largely duplicates the elements (FN4) of the definition of felony murder is irrelevant as a matter of federal constitutional law. With this clearly in mind, the majority's attempt to distinguish *Lowenfield* on the ground that Tennessee has no comprehensive list of narrowly defined capital offenses loses all its persuasive force.

This failure of the analysis employed by the *Middlebrooks* majority to accommodate the concerns prompted by my argument concerning the 1989 amendment is of paramount importance because the *Middlebrooks* majority failed to enunciate "adequate and independent state grounds," *Michigan v. Long,* 463 U.S. 1032, 1037-45, 103 S.Ct. 3469, 3474-78, 77 L.Ed.2d 1201 (1983), for deviating from an ascertainable Eighth Amendment standard. Indeed, it would be extremely difficult to do so because there is nothing in the Tennessee Constitution or in our state's capital punishment jurisprudence that compelled the *Middlebrooks* majority to deviate from such a federal standard. This conclusion is accentuated by the fact that the majority did not discuss any Tennessee decision in its opinion; its analysis was entirely based on federal law. This reliance on federal law is underscored by the fact that the United States Supreme Court granted certiorari in this case; (FN5) and it was argued by the parties before being dismissed as improvidently granted. (FN6)

Viewed from this perspective, the *Middlebrooks* majority's sole argument is, and must be, that it is irrational and/or disproportionate for the *Tison*-type felony murderer to enter the sentencing phase of the proceedings with one aggravating circumstance in place while the intentional murderer enters the sentencing phase with no such burden. I would reply only that this delicate, difficult matter is solely one for the determination of the legislature--the most direct link, other than the lay jury, to the moral will of the community. *See Spaziano v. Florida,* 468 U.S. 447, 472-90, 104 S.Ct. 3154, 3168-78, 82 L.Ed.2d 340 (1984) (Stevens, J. dissenting). As Justice O'Connor so ably pointed out in *Tison,* there is nothing inherently irrational about the statement that some felony murderers are much more dangerous than some murderers who kill in an intentional, premeditated fashion. Therefore, there is nothing inherently irrational about the legislature's choice to treat them differently. Moreover, under the argument set forth above, the jury itself will perform the narrowing function in its determination

of whether the defendant is guilty of felony murder in the first place, not an appellate court. Because the jury is charged, in a capital case, with the primary sentencing responsibility in Tennessee, its determination as to whether the death penalty may be constitutionally imposed on a defendant is superior to that same decision made by on appellate review by judges, who are by definition more removed from the popular will than are juries. *Spaziano,* 468 U.S. at 486-87, 104 S.Ct. at 3176.

Furthermore, any error that the jury may commit in applying §§ 39-13-202(a)(2) and (3) may still be remedied at another point in the sentencing process. As I pointed out in my *Middlebrooks* dissent, although it is true that a person convicted of a *Tison*-type felony murder automatically has one aggravating circumstance established against him, this does not translate into an automatic sentence of death. The jury still must find that the aggravating circumstances outweigh the mitigating circumstances to impose a sentence of death. Tenn.Code Ann. § 39-13-204(f). And the mitigating circumstances include the statutory factors set forth in § 39-13-204(j), plus any other relevant evidence. § 39-13- ***828.** 204(j)(9). Furthermore, in any case in which a sentence of death has been imposed, this Court must review that sentence to determine if: (1) the sentence was imposed in an arbitrary fashion; (2) the evidence supports the jury's findings as to the statutory aggravating circumstances; and (3) the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances. § 39-13-206(c)(1)(A), (B) and (C). Finally, this Court must conduct a proportionality review to determine if the sentence of death is excessive or disproportionate when compared to the penalty imposed in similar cases. § 39-13-206(c)(1)(D). In short, the process of sentencing in Tennessee is extremely individualized to ensure that the death penalty is employed in only the most deserving of cases.

Because I believe that the portions of Tennessee's first degree murder statute dealing with felony murder, when construed as I have urged, serve to narrow the class of death-eligible defendants in accordance with federal constitutional requirements, and because I believe that the *Middlebrooks* majority failed to enunciate a compelling justification for deviating from this ascertainable federal standard, I must respectfully dissent from Part-II(C) of the majority opinion.

Notwithstanding that I firmly believe the majority's position on this important issue to be in error, its rejection of the argument set forth in Part II of this dissenting opinion at least serves to finally resolve the uncertainty which has shrouded the felony murder doctrine since the *Middlebrooks* decision was released. Whatever other conclusions one may draw from *Middlebrooks* and the majority opinion in *Bigbee* (Part II-C), this much is now obvious: in the absence of other aggravating circumstances, Article I, § 16 of the Tennessee Constitution does not permit a defendant convicted of felony murder to be put to death without a showing that the defendant exhibited a mental state, with regard to the killing itself, of greater culpability than reckless indifference.

This now unequivocal message does not, however, mean that the felony murder aggravating circumstance, Tenn.Code Ann. § 39-13-204(i)(7), must disappear forever from our criminal law. Just as any statute that has been held to be unconstitutional may be remedied by legislative amendment, so too may § 39-13-204(i)(7). Because both the *Middlebrooks* and *Bigbee* majorities identify the mens rea component of our felony murder scheme as its constitutional deficiency, perhaps one way to remedy the scheme would be to insert a requirement in the aggravating circumstance that the defendant kill with either a "knowing" or "intentional" mental state. See Tenn.Code Ann. § 39-11-302(a) and (b). Although there may be other ways of ensuring the constitutionality of the scheme, this appears to me to be the most straightforward method. (FN7)

CONCLUSION

I had initially hoped by this dissent to convince the newest member of this Court, who did not participate in *Middlebrooks,* to join with the *Middlebrooks* dissenters in this decision and thereby correct what I believe to have been an erroneous interpretation of both the state and federal constitutions. I have failed in this endeavor. However, I chose to file this lengthy dissent in the hope that the members of this Court would further clarify their respective positions regarding the constitutionality of our felony murder scheme in light of the 1989 amendment to the felony murder statute. This they have done. I have also filed this dissent to point out that the holdings of the majorities in *Middlebrooks* and the present case should not be interpreted, in my opinion, as forever foreclosing capital punishment for felony murder in this state in the absence of some additional aggravating circumstance. It is abundantly clear, however, that any further action in this important and controversial area of our state's capital punishment jurisprudence will have to be taken by the legislature.

O'BRIEN, C.J., concurs.

(FN1.) Tenn.Code Ann. § 39-2-203(i) [now Tenn.Code Ann. § 39-13-204(i) (1991)]--No death penalty shall be imposed but upon a unanimous finding, as heretofore indicated, of the existence of one or more of the statutory aggravating circumstances, which shall be limited to the following:

(2) The defendant was previously convicted of one or more felonies, other than the present charge, which involve the use or threat of violence to the person;

(7) The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb....

(FN2.) The defendant contends that even if the

error is harmless as to guilt, it was not harmless as to sentencing. We disagree. There was no mention of the erroneously admitted evidence during any portion of the penalty phase of the trial. Thus, we conclude that its admission was harmless as to sentencing as well.

*828 (FN3.) At the first conference on July 12, 1990, counsel for Baker and Chris Hoosier were also present.

(FN4.) The law interpreted in *Bates* and *Moore* has since been amended. *See* Tenn.Code Ann. § 39-13-204(i)(2) (1991 & Supp.1993).

(FN1.) Tennessee has imposed by statute and court decisions, other limitations on the imposition of the sentence of death which exceed the minimum standard required under the United States Constitution. *See State v. Howell,* 868 S.W.2d 238, 267-68 (Tenn.1993) (Reid, C.J., concurring).

FN2. Justice Drowota concurring and dissenting at p. 825.

(FN1.) The Tennessee Legislative scheme follows the same procedure.

(FN1.) In 1987, at the time Middlebrooks was charged, § 39-13-204(i)(7) provided as follows:

The murder was committed while the defendant was engaged in committing, or was an accomplice in the commission of, or was attempting to commit, or was fleeing after committing or attempting to commit, any first degree murder, arson, rape, robbery, burglary, theft, kidnapping, aircraft piracy, or unlawful throwing, placing or discharging of a destructive device or bomb[.]

(FN2.) In 1987, § 39-13-202(a) provided as follows:

Every murder perpetrated by means of poison, lying in wait, or by other kinds of wilful, deliberate, malicious, and premeditated killing, *or committed in the perpetration of, or attempt to perpetrate, any murder in the first degree, arson, rape, robbery, burglary, larceny, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb* ... (emphasis added).

(FN3.) The argument set forth in Part II is not applicable to this case because Bigbee was indicted prior to the effective date of the 1989 amendment.

(FN4.) Of course, the felony murder aggravating circumstance does not totally duplicate the post-1989 definition of felony murder because the definition of felony murder now contains the element of "recklessness" that the aggravating circumstance does not have.

(FN5.) --- U.S. ----, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993).

(FN6.) Although the United States Supreme Court had denied Middlebrooks's petition to dismiss for lack of jurisdiction, --- U.S. ----, 114 S.Ct. 48, it dismissed the petition, 510 U.S. 124, 114 S.Ct. 651, in apparent reliance on our subsequent statement in *State v. Howell,* 868 S.W.2d 238, 259 n. 7 (Tenn.1993) that the decision in *Middlebrooks* was based on Art. I, § 16 of the Tennessee Constitution.

(FN7.) Of course, the definition of felony murder itself could be amended to include one of these mental states. However, because Tennessee already utilizes a scheme of aggravating and mitigating circumstances, it would probably be preferable to amend the aggravating circumstance.

*196 31 S.W.3d 196

Supreme Court of Tennessee,
at Jackson.

STATE of Tennessee
v.
David M. KEEN.
Oct. 5, 2000.

Defendant pleaded guilty in the Criminal Court, Shelby County, John P. Colton, Jr., J., to capital murder and was sentenced to death by a jury. On automatic appeal, the Supreme Court, 926 S.W.2d 727, reversed and remanded. After a new sentencing hearing in the Criminal Court, Shelby County, a jury again sentenced defendant to death. Defendant appealed. The Court of Criminal Appeals affirmed. On automatic appeal, the Supreme Court, Barker, J., held that: (1) evidence supported jury's finding of "especially heinous, atrocious, or cruel" statutory aggravating circumstance; (2) defendant was not entitled to jury instruction on the sentence of life imprisonment without the possibility of parole; (3) error was harmless in defendant's not receiving proffered instruction on jury's use of circumstantial evidence; and (4) death sentence was not disproportionate to other cases in which the defendant received the death penalty.

Affirmed.

Birch, J., filed a dissenting opinion.

West Headnotes

[1] Sentencing and Punishment ⚿ 1788(7)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(7) Presumptions.

[See headnote text below]

[1] Sentencing and Punishment ⚿ 1788(9)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(9) Questions of Fact.
In determining on appeal whether the evidence at the punishment phase of a capital murder trial supports the application of an aggravating circumstance, the proper standard to consider is whether, after reviewing the evidence in the light most favorable to the state, a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt. T.C.A. § 39-13-206(c)(1).

[2] Sentencing and Punishment ⚿ 1714
350H ----
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1714 Age.

[See headnote text below]

[2] Sentencing and Punishment ⚿ 1727
350H ----
350HVIII The Death Penalty
350HVIII(F) Factors Related to Status of Victim
350Hk1727 Age.
Evidence supported jury's finding, at punishment phase of capital murder trial, of statutory aggravating circumstance that the victim was less than 12 years old and defendant was 18 years of age or older, as victim was 8 years old at the time of her death and defendant was 27 years old. T.C.A. § 39-13-204(i)(1).

[3] Sentencing and Punishment ⚿ 1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
The "especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute may be proved under either of two prongs: torture or serious physical abuse. T.C.A. § 39-13-204(i)(5).

[4] Sentencing and Punishment ⚿ 1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
The phrase "serious physical abuse beyond that necessary to produce death," of the "especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute, is self-explanatory, in that the abuse must be physical rather than mental in nature; the word "serious" alludes to a matter of degree, and the term "abuse" is defined as an act that is excessive or which makes improper use of a thing, or which uses a thing in a manner contrary to the natural or legal rules for its use. T.C.A. § 39-13-204(i)(5).

[5] Sentencing and Punishment ⚿ 1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
Evidence supported jury's finding, at punishment phase of capital murder trial, of "especially heinous, atrocious, or cruel" statutory aggravating circumstance, in that defendant tortured victim, where defendant's statements established that he kidnaped the eight-year-old victim under the pretense that she was being taken to see her mother, defendant forcibly raped her in the car while crushing her throat with his left hand, and victim was alive and conscious at least through part of the rape. T.C.A. § 39-13-204(i)(5).

[6] Sentencing and Punishment ⚿ 1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
The anticipation of physical harm to oneself is torturous, so as to establish the "especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute. T.C.A. § 39-13-204(i)(5).

[7] Sentencing and Punishment ⚿ 1684

350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
The physical and mental pain suffered by the victim of strangulation may constitute "torture" within the meaning of the "especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute. T.C.A. § 39-13-204(i)(5).

[8] Sentencing and Punishment ⚿1660
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1660 Dual Use of Evidence or Aggravating Factor.
A rape, in and of itself, cannot support imposition of the death penalty when the crime charged is murder in the perpetration of a rape.

[9] Sentencing and Punishment ⚿1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
Evidence was sufficient to establish, at punishment phase of capital murder trial, that the victim suffered serous physical abuse beyond that necessary to produce death, and thus, was sufficient to establish "especially heinous, atrocious, or cruel" statutory aggravating circumstance, even if defendant's manually choking of eight-year-old victim was not the cause of her death, where defendant admitted that he choked the victim so forcefully while he was raping her that she stopped breathing, turned blue, and lapsed into unconsciousness. T.C.A. § 39-13-204(i)(5).

[10] Sentencing and Punishment ⚿1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
There is no requirement that the cause or mode of death also be the cause or mode of the "serious physical abuse beyond that necessary to produce death" in order to establish the "especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute. T.C.A. § 39-13-204(i)(5).

[11] Criminal Law ⚿872.5
110 ----
110XX Trial
110XX(K) Verdict
110k872.5 Assent of Required Number of Jurors.
Permitting jurors, at capital murder trial, to find either "torture" or "serious physical abuse beyond that necessary to produce death," to establish the "especially heinous, atrocious, or cruel" statutory *196 aggravating circumstance did not deprive defendant of his constitutional right to a unanimous jury. U.S.C.A. Const. Art. 1, § 6; T.C.A. § 39-13-204(i)(5).

[12] Criminal Law ⚿872.5
110 ----
110XX Trial
110XX(K) Verdict
110k872.5 Assent of Required Number of Jurors.
The right to a unanimous jury verdict is fundamental, immediately touching on the constitutional rights of an accused. U.S.C.A. Const. Art. 1, § 6.

[13] Criminal Law ⚿872.5
110 ----
110XX Trial
110XX(K) Verdict
110k872.5 Assent of Required Number of Jurors.

[See headnote text below]

[13] Sentencing and Punishment ⚿1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
"Torture" and "serious physical abuse beyond that necessary to produce death" are separate methods or theories of establishing the "especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute and are not separate aggravating circumstances by themselves; so long as the proof is sufficient under either theory for finding the aggravating circumstance beyond a reasonable doubt, and so long as all jurors agree that the aggravating circumstance is present and applicable to the case at hand, different jurors may rely upon either theory to reach their conclusion without violating a defendant's constitutional right to a unanimous verdict. U.S.C.A. Const. Art. 1, § 6; T.C.A. § 39-13-204(i)(5).

[14] Criminal Law ⚿872.5
110 ----
110XX Trial
110XX(K) Verdict
110k872.5 Assent of Required Number of Jurors.
Capital murder sentencing statute requiring unanimity only requires that the jury unanimously agree that an aggravating circumstance in question is present; it does not require that the jury agree as to all facts establishing the presence of that circumstance when different theories are available for consideration. T.C.A. § 39-13-204(i).

[15] Statutes ⚿188
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k188 In General.
Where the language of a statute is clear and unambiguous, courts will not extend the meaning of that statute beyond its plain and obvious import.

[16] Sentencing and Punishment ⚿1625
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 Aggravating or Mitigating Circumstances.
The test for constitutional infirmity of an aggravating circumstance of a capital murder sentencing statute is whether one could fairly conclude that the aggravating circumstance applies to every defendant eligible for the death penalty.

[17] Sentencing and Punishment ⚿1625
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 Aggravating or Mitigating Circumstances.
By defining "torture" to include "severe mental pain," Supreme Court has not broadened the scope of the "especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute so as to render it unconstitutional. T.C.A. § 39-13-204(i)(5).

[18] Sentencing and Punishment ⚿1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.
"Especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute does not require a mens rea on the part of the defendant to inflict torture or serious physical abuse upon the victim. T.C.A. § 39-13-204(i)(5).

[19] Sentencing and Punishment ⚿1625
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1622 Validity of Statute or Regulatory Provision
350Hk1625 Aggravating or Mitigating Circumstances.
That the jury is allowed to use its common sense, knowledge, and experience when deciding whether the "especially heinous, atrocious, or cruel" aggravating circumstance of capital murder sentencing statute applies does not render the statute constitutionally infirm as being too broad. T.C.A. § 39-13-204(i)(5).

[20] Sentencing and Punishment ⚿1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

[See headnote text below]

[20] Sentencing and Punishment ⚿1710
350H ----
350HVIII The Death Penalty
350HVIII(E) Factors Related to Offender
350Hk1710 Emotional Distress or Disturbance.

[See headnote text below]

[20] Sentencing and Punishment ⚿1727
350H ----
350HVIII The Death Penalty
350HVIII(F) Factors Related to Status of Victim
350Hk1727 Age.
Evidence supported jury's finding, at punishment phase of capital murder trial, that statutory aggravating circumstances that the victim was less than 12 years old and that the crime was especially heinous, atrocious, or cruel outweighed the 15 mitigating circumstances proffered by defendant, though defendant argued he was under extreme mental stress; defendant secreted the eight-year-old victim away by driving her to a discrete and remote location, defendant then violently raped and assaulted her, while manually strangling her with such force as to render her unconscious. T.C.A. § 39-13-204.

[21] Sentencing and Punishment ⚿1633
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1631 Retroactive Operation
350Hk1633 Effect of Amendment or Other Modification.
Defendant who committed capital murder before effective date of amendment to sentencing statute was not entitled to instruction, at punishment phase, on the sentence of life imprisonment without the possibility of parole, though original death sentence was reversed and second sentencing hearing occurred after effective date of amendment. T.C.A. § 39-13-204.

[22] Statutes ⚿190
361 ----
361VI Construction and Operation
361VI(A) General Rules of Construction
361k187 Meaning of Language
361k190 Existence of Ambiguity.
Courts will not construe the plain, unambiguous language of a statute to give any forced or subtle construction which would extend or limit its meaning.

[23] Sentencing and Punishment ⚿1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.
Defendant who was statutorily precluded from receiving instruction, at punishment phase of capital murder trial, on the sentence of life imprisonment without the possibility of parole, on ground offense occurred before effective date of amendment to sentencing statute, was not entitled to the instruction on contention that failure to so instruct would be contrary to Eight Amendment's evolving standards of decency doctrine. U.S.C.A. Const.Amend. 8; T.C.A.§ 39-13-204.

[24] Sentencing and Punishment ⚿1616
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1613 Requirements for Imposition
350Hk1616 Avoidance of Arbitrariness or Capriciousness.

[See headnote text below]

[24] Sentencing and Punishment ⚿1736
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)1 In General
350Hk1736 In General.
So long as the system used to impose death is not rendered arbitrary or capricious in that the sentencing authority lacks adequate information or

*196 guidance, the procedural protections of the Eighth Amendment in capital cases have no application. U.S.C.A. Const.Amend. 8.

[25] Sentencing and Punishment ⚿1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.
A jury instruction on the sentence of life imprisonment without the possibility of parole is not required under the Eighth Amendment in any scheme of capital punishment. U.S.C.A. Const.Amend. 8; T.C.A. § 39-13-204.

[26] Sentencing and Punishment ⚿1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.
Defendant who was statutorily precluded from receiving instruction, at punishment phase of capital murder trial, on the sentence of life imprisonment without the possibility of parole, on ground offense occurred before effective date of amendment to sentencing statute, was not entitled to the instruction on contention that death was in excess of that reasonably needed for incapacitation of the offender. T.C.A. § 39-13-204.

[27] Sentencing and Punishment ⚿1610
350H ----
350HVIII The Death Penalty
350HVIII(A) In General
350Hk1610 In General.
The only two penological goals served by capital punishment are retribution and general deterrence of crime, and overall philosophical justification for the death penalty does not rest upon the need for incapacitation.

[28] Sentencing and Punishment ⚿1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.
Defendant who was statutorily precluded from receiving instruction, at punishment phase of capital murder trial, on the sentence of life imprisonment without the possibility of parole, on ground offense occurred before effective date of amendment to sentencing statute, was not entitled to the instruction on contention he would be denied equal protection of the laws; even if others similarly situated received the instruction, defendant failed to show that the failure to provide the instruction had a discriminatory effect. U.S.C.A. Const.Amend. 14; T.C.A. § 39-13-204.

[29] Sentencing and Punishment ⚿1780(3)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)3 Hearing
350Hk1780 Conduct of Hearing
350Hk1780(3) Instructions.
Defendant should have received proffered instruction on jury's use of circumstantial evidence when a fact required to be proved was entirely made of such evidence, where state's proof of "torture" prong of "especially heinous, atrocious, or cruel" statutory mitigating circumstance was entirely by circumstantial evidence. T.C.A. § 39-13-204(i)(5).

[30] Sentencing and Punishment ⚿1789(9)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1789 Review of Proceedings to Impose Death Sentence
350Hk1789(9) Harmless and Reversible Error.
Error was harmless in defendant's not receiving proffered instruction on jury's use of circumstantial evidence when a fact required to be proved was entirely made of such evidence; though defendant was entitled to such instruction on ground state's proof of "torture" prong of "especially heinous, atrocious, or cruel" statutory mitigating circumstance was entirely by circumstantial evidence, the error did not affirmatively affect the outcome of the sentencing hearing. T.C.A. § 39-13-204(i)(5); Rules Crim.Proc., Rule 52(a).

[31] Sentencing and Punishment ⚿1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Supreme Court applies the precedent-seeking approach when conducting its comparative proportionality review of a death sentence, in which it compares a particular case with other cases in which the defendants were convicted of the same or similar crimes; it conducts this comparison by examining the facts of the crimes, the characteristics of the defendants, and the aggravating and mitigating circumstances involved. T.C.A. § 39-13-206(c)(1).

[32] Sentencing and Punishment ⚿1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
The purpose of the Supreme Court's comparative proportionality review of death sentences is to identify arbitrary or capricious sentences by determining whether the death penalty in a given case is disproportionate to the punishment imposed on others convicted of the same crime. T.C.A. § 39-13-206(c)(1).

[33] Sentencing and Punishment ⚿1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
A death sentence will be considered disproportionate if the case, taken as a whole, is

plainly lacking in circumstances consistent with those in similar cases in which the death penalty has previously been imposed. T.C.A. § 39-13-206(c)(1)

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[34] Sentencing and Punishment 1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Supreme Court's first task in conducting a comparative proportionality review of a death sentence is to identify the pool of similar cases, which includes all cases in which the defendant is convicted of first-degree murder and in which a capital sentencing hearing was actually conducted, to which it compares the defendant's case; it then considers a multitude of variables, in light of the experienced judgment and intuition of the Court's members. T.C.A. § 39-13-206(c)(1).

[35] Sentencing and Punishment 1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
With respect to the nature and circumstances of the offense, the relevant factors considered by the Supreme Court when conducting its comparative proportionality review of a death sentence include, but are not limited to: (1) the means of death; (2) the manner of death, such as whether the death was violent or torturous; (3) the motivation for the killing; (4) the place of death; (5) the similarity of the victims' circumstances including age, physical and mental conditions, and the victims' treatment during the killing; (6) the absence or presence of premeditation; (7) the absence or presence of provocation; (8) the absence or presence of justification; and (9) the injury to and effects on non-decedent victims. T.C.A. § 39-13-206(c)(1).

[36] Sentencing and Punishment 1684
350H ----
350HVIII The Death Penalty
350HVIII(D) Factors Related to Offense
350Hk1684 Vileness, Heinousness, or Atrocity.

[See headnote text below]

[36] Sentencing and Punishment 1727
350H ----
350HVIII The Death Penalty
350HVIII(F) Factors Related to Status of Victim
350Hk1727 Age.
Death sentence imposed on defendant convicted of first degree murder in perpetration of rape was not disproportionate to similar cases in which the death penalty was imposed, ***196** where jury found statutory aggravating circumstances that the victim was less than 12 years old and that the crime was especially heinous, atrocious, or cruel. T.C.A. §§ 39-13-204(i)(1, 5), 39-13-206(c)(1).

[37] Sentencing and Punishment 1657
350H ----
350HVIII The Death Penalty
350HVIII(C) Factors Affecting Imposition in General
350Hk1657 Proportionality in General.
A sentence of death is not disproportionate merely because the circumstances of the offense are similar to those of another offense for which the defendant has received a life sentence; the isolated decision of a jury to afford mercy does not render a death sentence disproportionate. T.C.A. § 39-13-206(c)(1).

[38] Sentencing and Punishment 1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Supreme Court's inquiry, when conducting a comparative proportionality review of a death sentence, does not require a finding that a sentence less than death was never imposed in a case with similar characteristics; instead, its duty is to assure that no aberrant death sentence is affirmed. T.C.A. § 39-13-206(c)(1).

[39] Sentencing and Punishment 1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
Supreme Court's comparative proportionality review of a death sentence is not the sole, or even the constitutionally necessary, protection against imposition of arbitrary death sentences, and a death sentence may be presumed to be proportionate where it is imposed under a system which furnishes sufficient guidance to the sentencer through constitutionally valid aggravating and mitigating circumstances. T.C.A. § 39-13-206(c)(1).

[40] Sentencing and Punishment 1788(6)
350H ----
350HVIII The Death Penalty
350HVIII(G) Proceedings
350HVIII(G)4 Determination and Disposition
350Hk1788 Review of Death Sentence
350Hk1788(6) Proportionality.
When conducting a comparative proportionality review of a death sentence, the Supreme Court looks only to cases in which the death penalty was sought and a sentencing hearing was held, because the aim of proportionality review is to ascertain what other capital sentencing authorities have done with similar capital murder offenses; the only cases that could be deemed similar are those in which imposition of the death penalty was properly before the sentencing authority for determination. T.C.A. § 39-13-206(c)(1).

***201** W. Mark Ward, Assistant Shelby County Public Defender, Memphis, TN, for appellant, David M. Keen.

Paul G. Summers, Attorney General and Reporter; Michael E. Moore, Solicitor General; Michael J. Fahey, II, Assistant Attorney General, Nashville, TN, for appellee, State of Tennessee.

OPINION

WILLIAM M. BARKER, J., delivered the opinion of the court, in which E. RILEY ANDERSON, C.J., and JANICE M. HOLDER, J., joined.

The appellant was sentenced to death for the murder of eight-year-old Ashley Nicole Reed in 1990. On automatic appeal, this Court reversed the sentence based upon improper jury instructions, and we remanded the case for resentencing. *See State v. Keen*, 926 S.W.2d 727 (Tenn. 1994). At the second sentencing hearing, the appellant was again sentenced to death, and the Court of Criminal Appeals affirmed. On automatic appeal from this second sentencing hearing, this Court has requested additional argument and briefing on the following five issues: (1) whether the evidence was legally insufficient to support the jury's finding of the "especially heinous, atrocious, or cruel" aggravating circumstance; (2) whether permitting the jurors to find *either* "torture" or "serious physical abuse beyond that necessary to produce death" denied the appellant his constitutional right to a unanimous jury finding of the basis for the "especially heinous, atrocious, or cruel" aggravating circumstance; (3) whether the jury instruction on the "especially heinous, atrocious, or cruel" aggravating circumstance failed to narrow the class of persons eligible for the death penalty; (4) whether the trial court's failure to permit the jury to consider the sentencing option of life without parole violated the Eight and Fourteenth Amendments to the United States Constitution and Article I, sections eight and sixteen of the Tennessee Constitution; and (5) whether the trial court erred in refusing the defendant's special request for an instruction on circumstantial evidence. We hold that none of these issues warrants reversal of the sentence. We further hold that the two aggravating circumstances found by the jury are amply supported by the evidence, and we agree that the aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt. Finally, we hold that the sentence of death was not arbitrarily or disproportionately applied in the appellant's case. With respect to all other issues not specifically discussed in this opinion, we agree with and affirm the judgment of the Court of Criminal Appeals.

The present appeal in this capital case arises from the resentencing of the appellant, David M. Keen, who pleaded guilty in February of 1991 to first degree murder in perpetration of the rape of eight-year-old Ashley Nicole (Nikki) Reed. The appellant was sentenced to death by a Shelby County jury, but this Court reversed the sentence on automatic appeal after finding reversible error in the "failure of the trial judge to properly include in the jury instructions that aggravating circumstances must be proven to outweigh any mitigating circumstances 'beyond a reasonable doubt.' " *See State v. Keen*, 926 S.W.2d 727, 736 (Tenn.1994). We remanded the ***202** case to the Shelby County Criminal Court for a new sentencing hearing, and on August 15, 1997, a jury again sentenced the appellant to death for the murder of Nikki Reed. The Court of Criminal Appeals affirmed the sentence of death after this second hearing.

On automatic appeal pursuant to Tennessee Code Annotated section 39-13-206(a)(1), the appellant's case was docketed in this Court. The appellant raised fourteen issues in his initial brief, and after carefully examining the entire record and the law--including the opinion of the Court of Criminal Appeals and the briefs of the appellant and the State--this Court entered an order limiting argument and requesting additional briefing on the following five issues:

(1) whether the evidence was legally insufficient to support the jury's finding of the "especially heinous, atrocious, or cruel" aggravating circumstance;

(2) whether permitting the jurors to find *either* "torture" *or* "serious physical abuse beyond that necessary to produce death" denied the appellant his constitutional right to a unanimous jury finding of the basis for the "especially heinous, atrocious, or cruel" aggravating circumstance;

(3) whether the jury instruction on the "especially heinous, atrocious, or cruel" aggravating circumstance failed to narrow the class of persons eligible for the death penalty;

(4) whether the trial court's failure to permit the jury to consider the sentencing option of life without parole violated the Eighth and Fourteenth Amendments to the United States Constitution and Article I, sections eight and sixteen of the Tennessee Constitution; and

(5) whether the trial court erred in refusing the defendant's special request for an instruction on circumstantial evidence.

For the reasons given herein, we find that none of the issues raised by the appellant merits reversal of the sentence, and we remand this case for enforcement of the judgment of this Court.

EVIDENCE PRESENTED AT THE SENTENCING HEARING

The evidence presented at the second sentencing hearing was substantially similar to the evidence presented by the State and the appellant at the first sentencing hearing in 1991. Nevertheless, because many of the issues raised in an automatic appeal involve questions concerning the evidence supporting the applicable sentencing criteria, it is necessary to review anew all of the evidence presented during this second sentencing hearing.

At the time of the tragic events giving rise to this case, the appellant was living with his then-fiancée, Deborah Wilson, in a three-bedroom mobile home in Millington, Tennessee. Also living with the appellant and his fiancée were Deborah's four children, including Ashley Nicole, her mother, and her father. During the late afternoon of March 17, 1990, the appellant and Deborah met her mother and father at the VFW Club in West Memphis, Arkansas, to eat dinner and play bingo. All of Deborah's children were spending the night with various friends. Shortly after the appellant and Deborah arrived at the VFW Club, Deborah's father, Jessie Wilson, expressed some concern over Nikki's arrangements to sleep over at a friend's house. The appellant offered to go back to Millington to check on Nikki, and Mr. Wilson

allowed the appellant to borrow his car to make the short trip.

The appellant left the VFW Club at about 5:30, and he returned about two hours later. Upon returning, he told everyone that Nikki was spending the night with her friend, Shantell. The group stayed at the VFW Club until about 10:30 that evening, and on his way back home to Millington, Mr. Wilson noticed that the green blanket he usually kept in his car was missing. Mr. Wilson questioned the appellant about the blanket, but the appellant *203 merely replied that he put the blanket in the back seat of the car because he did not want to sit on it.

The next morning, Deborah and the appellant went shopping at the local Wal Mart while Mrs. Wilson went to pick Nikki up for church. When Mrs. Wilson returned home, she told her husband that Nikki did not go to her friend's house the previous evening, and the two of them searched around the mobile home park for Nikki. When Deborah and the appellant returned from shopping, they joined the search for Nikki. After searching all day and finding no trace of his granddaughter, Mr. Wilson told Deborah to report Nikki's disappearance to the police. Deborah and the appellant then left on foot for the police station to file a missing persons report.

In the meantime, Mr. Wilson and his wife again searched the trailer park, and after waiting some time for Deborah and the appellant to return from the police station, they decided to drive to the police station themselves. As soon as Mrs. Wilson opened the door to get into her car, she saw a pair of panties lying on the passenger-side floorboard. Mr. Wilson told his wife not to move the panties, and they drove to the police station where they notified an officer about their discovery. When Mr. Wilson later approached the appellant about the panties in the car, the appellant was evasive and would not answer his questions.

The next day, a detective with the Millington Police Department asked the appellant and Deborah to come to the police station for questioning. Although the appellant initially denied any involvement in Nikki's disappearance, he admitted after further questioning by the police that he "threw her in the river." The appellant then took the detective and others officers to Memphis along the north end of Mud Island in the Wolf River, where the police found Nikki's naked body wrapped in a green blanket. Although the police found a blue denim skirt and a pink shirt wrapped with the body, the officers found no panties.

The appellant was taken to the Memphis Police Department where he again confessed to the murder of Nikki Reed. The appellant stated that when he found Nikki, he intended to take her back with him to West Memphis because he was unsure whether she could spend the night with her friend. In his initial statement to the Millington police, the appellant stated that on the return trip to West Memphis, he and Nikki argued about something concerning her seat belt. The appellant stated that during this argument, he became very angry, grabbed Nikki's throat, and covered her mouth until she turned blue. Although he admitted to wrapping Nikki's body in the green blanket and throwing her into the river, he could not remember whether he struck her, took her clothes off, or raped her.

However, when questioned further in Memphis about the incident, the appellant admitted to his actions in gruesome detail:

> I pulled off to the side of the road and undressed Ashley and undid my pants, and I held my hand over her throat and tried to penetrate [her]. I felt crap and I stopped, and Ashley had turned blue in the face. She wasn't breathing. I tied a shoe lace around her neck and she still was not breathing. I untied the shoe lace, wrapped her up in a blanket, tied the blanket together and dumped her off into the river off of the old Auction Street boat Dock. Then I went back over to West Memphis and told Ashley's mother that Ashley was spending the night at her friend, Shantell's, house.

The appellant also stated that Nikki struggled "for a little while," although she did not scream or holler, because he "was practically on top of her with [his] hand on her throat." Nikki was eight years old and weighed sixty-eight pounds.

At the sentencing hearing, the State called Dr. Jerry Francisco, the Shelby County Medical Examiner, to testify as to *204 the results of the victim's autopsy. Dr. Francisco testified that Nikki suffered multiple scrapes and bruises to her face and neck, and that she had a deep ligature mark around the front of her neck caused by a tightly-pulled fabric cord, such as a shoelace. The medical examiner also found a bruise and scrapes around her genital area and a tear on the posterior wall of the vagina. Sperm heads were also found inside the vagina. Dr. Francisco determined that Nikki was alive while she was raped and suffered the various injuries, although he could not say with certainty that she was conscious during the entire episode.

In addition, the autopsy revealed that fluid was found in the lungs of the victim. Although Dr. Francisco stated that fluid in the lungs can be associated with either drowning or asphyxia, he testified that the left side of the heart was diluted, which "is the type of change you see in a person who is alive and submerged." Although the medical examiner stated that the ligature strangulation was the actual cause of death, he also stated that "[i]n my opinion, she was alive at the time she was placed in the water."

In mitigation, the defense called the appellant's adoptive parents, Robert and Evelyn Brieschke, who adopted the appellant and his older brother when the appellant was four years old. His adoptive parents testified that the appellant was malnourished when he was first adopted, and that he was very nervous and upset, had difficulty playing and interacting with others, and had difficulty sleeping. The appellant was diagnosed with Attention Deficit Disorder in fourth grade, and he was placed on Ritalin, which offered some improvement. The Brieschkes later learned from a psychological report completed before the appellant's adoption that the appellant was in need of immediate help and counseling, although this information was kept from them at the time of the adoption. In high school, the appellant skipped classes, smoked marijuana, and drank alcohol. At

one point, he was arrested for breaking into an automobile agency and stealing a car. In his junior year, the appellant dropped out of high school and joined the United States Navy.

The appellant's brother and two stepsisters testified that the appellant's natural father was physically and emotionally abusive. Because his father was wanted for theft and child neglect, he constantly moved his family to evade arrest, and during one two-year period, the family moved no less than twenty-six times. The children were beaten on a daily basis, sometimes with electrical cords and pieces of lumber. The father would also slaughter livestock in front of his children while threatening to do the same to them if they misbehaved. One of the appellant's sisters, who admitted being the victim of sexual abuse, described their childhood as "an environment of terror." Even after the appellant was abandoned by his natural parents, he was placed in an abusive foster home before being adopted by the Brieschkes.

The defense also called Dr. John Ciocca, a clinical psychologist, who conducted a psychological evaluation of the appellant and testified as to the results. Dr. Ciocca diagnosed the appellant as suffering from post-traumatic stress disorder, serious depression, and attention deficit disorder. Dr. Ciocca stated that the appellant also showed some signs of pedophilia, although he admitted that he found no indications of persistent and constant sexual interest in children, which is necessary for a proper diagnosis. One of the tests administered by Dr. Ciocca indicated that the appellant suffered from occasions "where he is not in good contact with reality," and that another test showed the "presence of psychotic-like symptoms."

Dr. Ciocca also interviewed the appellant and his family, and he reviewed numerous medical and psychological records, including an evaluation conducted at Winnebago State Hospital in Wisconsin. From an examination of these interviews ***205** and records, Dr. Ciocca testified that the appellant was "born into a family of crisis," which "had fallen on hard times," and in which "physical abuse and sexual abuse were rather rampant." Although he was relocated to a foster home, the appellant remembered being abused and anally raped by his foster father. According to Dr. Ciocca, the absence of nurturing, along with the presence of general hostility or apathy toward the appellant significantly affected his normal childhood development. Dr. Ciocca also stated that the appellant was "extraordinarily distressed at what he's done," and that he "takes full responsibility for it."

The State argued to the jury that the facts supported the presence of two aggravating circumstances: (1) that the murder was committed against a person less that twelve years of age and the defendant was eighteen years of age or older, *see* Tenn.Code Ann. § 39-13-204(i)(1); and (2) that the murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death, *see* Tenn.Code Ann. § 39-13-204(i)(5). The appellant, on the other hand, argued that fourteen statutory and non-statutory mitigating circumstances applied and should be considered. (FN1) The jury found that the State proved both aggravating circumstances beyond a reasonable doubt, and after finding that these aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt, the jury sentenced the appellant to death. The jury made no specific findings as to which, if any, mitigating circumstances were supported by the proof.

I. REVIEW OF THE AGGRAVATING AND MITIGATING CIRCUMSTANCES

[1] Pursuant to Tennessee Code Annotated section 39-13-206(c)(1), this Court is charged with independently determining whether the evidence supports the jury's finding of statutory aggravating circumstances and whether the evidence supports the jury's finding that the aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt. In determining whether the evidence supports the application of an aggravating circumstance, the proper standard to consider is whether, after reviewing the evidence in the light most favorable to the State, "a rational trier of fact could have found the existence of the aggravating circumstance beyond a reasonable doubt." *State v. Henderson,* 24 S.W.3d 307, 313 (Tenn.2000); *State v. Keough,* 18 S.W.3d 175, 180-81 (Tenn.2000); *State v. Carter,* 988 S.W.2d 145, 150 (Tenn.1999). After a careful review of the testimony and evidence presented at the sentencing hearing, we conclude that the evidence fully supports ***206** the jury's findings that both aggravating circumstances are present in this case and that the aggravating circumstances outweigh any mitigating circumstances beyond a reasonable doubt.

A. Tennessee Code Annotated section 39-13-204(i)(1)

[2] Tennessee Code Annotated section 39-13-204(i)(1) provides as a statutory aggravating circumstance that "[t]he murder was committed against a person less that twelve (12) years of age and the defendant was eighteen (18) years of age, or older." The record indisputably shows that the victim in this case, Nikki Reed, was eight years old at the time of her death and that the appellant was twenty-seven years old. Viewed in a light most favorable to the State, we conclude that a rational trier of fact could have found the existence of this aggravating circumstance beyond a reasonable doubt.

B. Tennessee Code Annotated section 39-13-204(i)(5)

Tennessee Code Annotated section 39-13-204(i)(5) provides as a statutory aggravating circumstance that "[t]he murder was especially heinous, atrocious, or cruel in that it involved torture or serious physical abuse beyond that necessary to produce death." The appellant makes three arguments as to how this aggravating circumstance was improperly applied to the facts and circumstances of this case. First, he argues that the proof was insufficient to justify finding this aggravating circumstance beyond a reasonable doubt because the proof failed to demonstrate that the victim was conscious while she was tortured or suffered serious physical abuse beyond that necessary to cause death. Second, the

appellant argues that his right to a unanimous jury was compromised by allowing the jury to consider either torture or serious physical abuse in finding the presence of this aggravating circumstance. Last, the appellant argues that the (i)(5) aggravating circumstance has been interpreted so broadly as to render it unconstitutional in that it fails to sufficiently narrow the class of death-eligible defendants. Having thoroughly considered each of the appellant's arguments, we find that none has merit, and we affirm the jury's finding of the presence of this aggravating circumstance beyond a reasonable doubt.

1. Evidentiary Sufficiency of the (i)(5) Aggravating Circumstance

[3][4] The "especially heinous, atrocious or cruel" aggravating circumstance "may be proved under either of two prongs: torture or serious physical abuse." *See State v. Hall,* 8 S.W.3d 593, 601 (Tenn.1999). This Court has defined "torture" as "the infliction of severe physical or mental pain upon the victim while he or she remains alive and conscious." *State v. Morris,* 24 S.W.3d 788, 797 (Tenn.2000); *State v. Williams,* 690 S.W.2d 517, 529 (Tenn.1985). The phrase "serious physical abuse beyond that necessary to produce death," on the other hand, is "self-explanatory; the abuse must be physical rather than mental in nature." *Hall,* 8 S.W.3d at 601; *see also State v. Suttles,* 30 S.W.3d 252, 262 (Tenn.2000). The "word 'serious' alludes to a matter of degree," and the term "abuse" is defined as "an act that is 'excessive' or which makes 'improper use of a thing,' or which uses a thing 'in a manner contrary to the natural or legal rules for its use.' " *State v. Odom,* 928 S.W.2d 18, 26 (Tenn.1996); *see also State v. Nesbit,* 978 S.W.2d 872, 887 (Tenn.1998); *Morris,* 24 S.W.3d at 797.

[5][6][7] Our case law is clear that "[t]he anticipation of physical harm to oneself is torturous" so as to establish this aggravating circumstance. *See State v. Carter,* 988 S.W.2d 145, 150 (Tenn.1999) (citing cases from other jurisdictions); *see also Nesbit,* 978 S.W.2d at 886-87; *State v. Hodges,* 944 S.W.2d 346, 358 (Tenn.1997). Our case law is also clear that the physical and mental pain suffered by the victim of strangulation may constitute torture within ***207** the meaning of the statute. *See State v. Cauthern,* 967 S.W.2d 726, 732-33 (Tenn.1998); *Hodges,* 944 S.W.2d at 358. The facts of this case, when viewed in a light most favorable to the State, easily satisfy both of these definitions. From the appellant's own statements, we know that this child was essentially kidnaped and secreted to a discrete and remote location--by someone in a position of trust--under the pretense that she was being taken to see her mother. The appellant stopped the car, and Nikki watched him take off his pants and then remove her own clothes. While still in the strict confines of the front seat of the car, the appellant climbed on top of her, covered her mouth, and began to forcibly rape her while crushing her throat with his left hand.

At some point while she was being violently raped, Nikki was struck in several parts of her face, and her head was smashed against the door handle. Although it is impossible to know how long Nikki remained conscious during this terrifying ordeal, it is uncontroverted that she was alive and conscious at least through part of the rape, because even though the full weight of the appellant was crushing her and even though she was being manually strangled, the appellant admitted that Nikki struggled to get free with her arms and legs. In fact, the appellant candidly admitted that she struggled to get free for "a little while." When the appellant finished his gruesome act, he noticed that she was no longer breathing and had turned blue, a fact he attributed to putting "too much pressure on her [neck] where she couldn't breathe."

There can be no reasonable doubt that while she struggled to free herself, Nikki was alive and conscious, and a jury could rationally infer from its common sense and everyday experience that she was extremely concerned about her own physical safety. *Cf. Nesbit,* 978 S.W.2d at 886 (stating that juries in capital cases may still "use their common knowledge and experience in deciding whether a fact is logically deducible from the circumstances in evidence, or in making reasonable inferences from the evidence, and may test the truth and weight of the evidence by their own general knowledge and judgment derived from experience, observation, and reflection"). Moreover, the jury would have been fully justified in concluding that as the appellant gradually choked off all air to the child, Nikki was in an extreme state of mental pain and anxiety, as well as enduring and intense physical pain. A rational jury using common sense and judgment could clearly find that the proof established, beyond a reasonable doubt, the torture of the victim through infliction of severe mental and physical pain, and our cases require no more.

[8] The appellant cites this Court's decision in *State v. Odom* for the proposition that the proof was insufficient to establish "torture" because penile rape alone cannot establish torture. We agree with *Odom* to the extent that a rape, in and of itself, cannot support imposition of the death penalty when the crime charged is murder in the perpetration of a rape. The appellant ignores, however, that the mental anguish of the child in this case was not derived solely from the act of penile penetration. Rather, the severe mental and physical pain of the victim necessary to establish "torture" is derived from all of the surrounding circumstances of the *murder,* which necessarily include the kidnaping and forcible confinement of the victim by someone in a position of trust, the brutal rape of the victim, and the violent manual strangulation of the victim to the point that she lost consciousness and turned blue.

While the mere *fact of rape* could not be used to impose death under the facts of the appellant's case, the sentencing authority certainly could have inquired into the unique circumstances surrounding the offense to determine whether the victim was "tortured" within the meaning of the (i)(5) aggravating circumstance. Contrary to the appellant's assertions, we find nothing ***208** in *Odom* which prevents a thorough examination of the circumstances surrounding the rape and murder. In fact, *Odom's* legitimate concerns with sufficient narrowing of the death-eligible class of defendants are actually furthered by such an examination, and only in this manner can the sentence of death be reserved for the "worst of the worse." Based on our review of the entire record in the present case, we find that a rational jury could have concluded

from all of the surrounding circumstances that Nikki Reed was tortured through the infliction of severe mental and physical pain.

[9][10] The appellant also argues that the proof is insufficient to establish that the victim suffered serious physical abuse beyond that necessary to produce death. Again, we must disagree. By the appellant's own admission, he manually choked the victim so forcefully that she stopped breathing, turned blue, and lapsed into unconsciousness. A rational jury could certainly have found that this particular manual strangulation constituted serious physical abuse beyond that necessary to produce death, even though the manual strangulation was not determined to be an actual cause of death. The law is clear that "[t]here is no requirement that the cause or mode of death also be the cause or mode of the 'serious physical abuse beyond that necessary to produce death.' " *Nesbit,* 978 S.W.2d at 887. Accordingly, we have no hesitation in also concluding that a rational jury could have found beyond a reasonable doubt that this murder was especially heinous, atrocious, or cruel in that it involved serious physical abuse beyond that necessary to produce death.

2. Right to Unanimous Jury Finding as to Either "Torture" or "Serious Physical Abuse Beyond That Necessary to Produce Death"

[11] The appellant next argues that by permitting the jurors to find *either* "torture" *or* "serious physical abuse beyond that necessary to produce death," the trial court denied him his constitutional right to a unanimous jury for the "especially heinous, atrocious, or cruel" aggravating circumstance. More specifically, the appellant notes that when the jury returned its verdict form, it indicated that it found that "the murder was especially heinous, atrocious, or cruel in that it involved torture *or* serious physical abuse beyond that necessary to produce death." (emphasis added). The appellant argues that because the jury returned its verdict in the disjunctive, "there is no way to determine whether the twelve jurors unanimously agreed on either basis for finding the aggravating circumstances or the facts in support thereof." In essence, the appellant argues that unless a jury unanimously agrees as to a particular set of facts constituting guilt--or in this case, the particular set of facts constituting the presence of the (i)(5) aggravating circumstance--a defendant is denied his or her right to a unanimous jury. After reviewing the applicable case law, we hold that the appellant was not denied his constitutional right to a unanimous jury or that a special unanimity instruction was required.

[12] It is beyond question that the right to a unanimous jury verdict is "fundamental, immediately touching on the constitutional rights of an accused." *See, e.g., Burlison v. State,* 501 S.W.2d 801, 804 (Tenn.1973). Our research reveals no case, however, in which we have held that the right to a unanimous jury verdict encompasses the right to have the jury unanimously agree as to the particular theory of guilt supporting conviction for a single crime. *See, e.g., State v. Lemacks,* 996 S.W.2d 166, 170-71 (Tenn.1999) (holding that jury need not be unanimous as between direct criminal liability or criminal responsibility arising out of the same transaction because criminal responsibility is not a "separate distinct crime"); *State v. Cribbs,* 967 S.W.2d 773 (Tenn.1998) (holding that general verdict of guilt on first degree murder poses no constitutional problem even though some jurors may ***209** have convicted the defendant based upon proof of felony murder or premeditated murder). In fact, we have recently reached just the opposite conclusion in *State v. Adams,* 24 S.W.3d 289 (Tenn.2000). In *Adams,* this Court was asked to decide whether a jury must unanimously agree on a specific serious bodily injury resulting from child neglect before it can properly return a guilty verdict for aggravated child abuse through neglect. In affirming the defendants' conviction and sentence, we stated,

> To adopt the appellants' argument that the jury must agree as to the specific serious bodily injury [supporting conviction for aggravated child abuse through neglect] requires, in essence, that the state elect the *facts to support elements* rather make an election of *offenses.* Our cases have not required that a jury unanimously agree as to facts supporting a particular element of a crime so long as the jury agrees that the appellant is guilty of the crime charged.

24 S.W.3d at 297 (emphasis in original). The United States Supreme Court has also stated that "different jurors may be persuaded by different pieces of evidence, even when they agree on the bottom line. Plainly, there is no general requirement that the jury reach agreement on the preliminary factual issues which underlie the verdict." *Schad v. Arizona,* 501 U.S. 624, 632, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991).

[13] It is clear that "torture" and "serious physical abuse beyond that necessary to produce death" are separate methods or theories of establishing the (i)(5) aggravator and not separate aggravating circumstances by themselves. We have stated previously that the phrase "especially heinous, atrocious, or cruel" is a unitary concept, *State v. Van Tran,* 864 S.W.2d 465, 479 (Tenn.1993), which "may be proved under either of two prongs: torture or serious physical abuse." *See Hall,* 8 S.W.3d at 601. Our cases simply do not require that jurors agree as to which theory supports the view that the murder is "especially heinous, atrocious, or cruel." So long as the proof is sufficient under either theory for finding the aggravating circumstance beyond a reasonable doubt, and so long as all jurors agree that the aggravating circumstance is present and applicable to the case at hand, different jurors may rely upon either theory to reach their conclusion. *See Suttles,* 30 S.W.3d at 266 ("This [(i)(5)] aggravating circumstance may be applied if the evidence is sufficient to support either torture or serious physical abuse beyond that necessary to produce death."), and cases cited therein.

As we have previously stated, the proof in this case was more than sufficient to allow a rational jury to find the (i)(5) aggravating circumstance beyond a reasonable doubt under either a theory of torture or a theory of serious physical abuse beyond that necessary to produce death. This is not a case where the gruesome acts by the appellant

establishing either torture or serious physical abuse occurred at such different times or under such varying circumstances that they could be said to be separate in fact. Rather, the proof established that the victim's severe mental pain and manual strangulation occurred proximately in time and space. In addition, we note that the court properly instructed the jury that it had to unanimously agree that the State proved this aggravating circumstance beyond a reasonable doubt, and the jury clearly indicated from its verdict form that it unanimously found the (i)(5) aggravating circumstance to be present and applicable in this case. Based on these reasons, we conclude that the appellant was not deprived of his right to a unanimous jury verdict.

In response, the appellant quotes a passage from *State v. Brown,* 823 S.W.2d 576 (Tenn.Crim.App.1991), as standing for the proposition that a jury must understand "its duty to agree on a particular set of facts." *Id.* at 583. A closer reading of *Brown,* however, shows that this language ***210** served only to reemphasize that "the purpose of election is to ensure that each juror is considering the same occurrence," *see State v. Shelton,* 851 S.W.2d 134, 138 (Tenn.1993), and it does not support the proposition that a jury must agree to the facts establishing a theory of an offense. The defendant in *Brown* was charged in an open-dated indictment with possession of cocaine, and the proof established that the defendant engaged in conduct constituting the charged crime on at least four separate occasions. In reversing the defendant's conviction, the Court of Criminal Appeals only required unanimous agreement as to the specific occurrence of the crime, *id* at 583-84, not agreement as to the facts supporting different theories of guilt arising out of that one occurrence. Once a jury has agreed on the specific occurrence at issue, *Brown* cannot properly be read to require further agreement as to the particular facts supporting the elements of that offense when different theories are available for consideration.

[14][15] The appellant also cites the capital sentencing statute which states that no death sentence may be imposed "but upon a unanimous finding that the state has proven beyond a reasonable doubt the existence of one or more of the statutory aggravating circumstances...." Tenn.Code Ann. § 39-13-204(i). A plain reading of this statute only requires that the jury unanimously agree that the aggravating circumstance in question is present; it does not require that the jury agree as to all facts establishing the presence of that circumstance when different theories are available for consideration. Where the language of the statute is clear and unambiguous, we will not extend the meaning of that statute beyond its plain and obvious import. *See, e.g., McClain v. Henry I. Siegel Co.,* 834 S.W.2d 295, 296 (Tenn.1992). This issue is without merit.

3. Constitutionality of the (i)(5) Aggravating Circumstance

The appellant next argues that the meaning of the "especially heinous, atrocious, or cruel" aggravating circumstance has been so broadly interpreted by the courts of this state that it now fails to adequately narrow the class of death-eligible defendants. More specifically, the appellant refers to several cases from this Court which (1) allow "torture" to include "severe mental pain," *see State v. Williams,* 690 S.W.2d 517 (Tenn.1985); (2) allow a finding of torture without any intent on the part of the defendant to inflict torture or serious physical abuse beyond that necessary to produce death, *see State v. Blanton,* 975 S.W.2d 269 (Tenn.1998); and (3) allow jurors to use their common knowledge and experience in finding that "physical and mental torture" was inflicted upon the victim, *see State v. Nesbit,* 978 S.W.2d 872 (Tenn.1998). Because of each of these "broadening constructions," the appellant argues, this aggravating circumstance "is applicable in virtually every first degree murder and fails to properly narrow that eligible for the death penalty." Again, we must disagree.

[16] The very purpose of the consideration of aggravating circumstances within a scheme of capital punishment is to provide some principled guidance for the sentencing authority to choose between death and a lesser sentence. *See, e.g., Godfrey v. Georgia,* 446 U.S. 420, 428-29, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980); *see also State v. Middlebrooks,* 995 S.W.2d 550, 556 (Tenn.1999) . Although a court could interpret an aggravating circumstance so broadly that it would allow the jury unlimited discretion in imposing the death penalty, *cf. State v. Wood,* 648 P.2d 71 (Utah 1981), the test for constitutional infirmity is whether one could fairly conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, *see Maynard v. Cartwright,* 486 U.S. 356, 364, 108 S.Ct. 1853, 100 L.Ed.2d 372 (1988) (invalidating aggravating circumstance that "an ordinary person could honestly believe" described every murder); *Godfrey,* 446 U.S. at 428-429, 100 S.Ct. ***211** 1759 ("A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.' "). We have consistently upheld the constitutionality of Tennessee Code Annotated section 39-2-203(i)(5) in the face of arguments that it applies to all defendants, and we have repeatedly rejected the contention that it is vague or overbroad. *See, e.g., State v. Middlebrooks,* 995 S.W.2d 550, 556 (Tenn.1999); *State v. Blanton,* 975 S.W.2d 269, 280 (Tenn.1998); *State v. Black,* 815 S.W.2d 166, 181 (Tenn.1991). Although the appellant's argument today differs somewhat from those previously advanced in other cases, we reaffirm the constitutionality of the "especially heinous, atrocious, or cruel" aggravating circumstance.

[17] First, it is clear that by defining "torture" to include "severe mental pain," this Court has not broadened the scope of the "especially heinous, atrocious, or cruel" aggravating circumstance so as to render it unconstitutional. In *Walton v. Arizona,* 497 U.S. 639, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), the United States Supreme Court upheld the application of Arizona's "especially heinous, cruel or depraved" aggravating circumstance. Although finding the wording of the circumstance facially vague, the Court nevertheless upheld its application because of the limiting constructions placed on the wording by the Arizona courts. One of the limiting constructions placed upon this aggravating circumstance was that the crime must have been "committed in an especially cruel manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death." In upholding this circumstance as applied, the *Walton* Court expressly

stated that a limiting construction which defines "mental anguish" to include "a victim's uncertainty as to his ultimate fate" passes constitutional muster. *Id.* at 654, 110 S.Ct. 3047. In addition, several other states with a statutory aggravating circumstance virtually identical to our (i)(5) circumstance have held that the word "torture" necessarily includes "mental anguish" within its meaning. (FN2) Accordingly, we conclude that the inclusion of "severe mental pain" within the definition of "torture" has not rendered this aggravating circumstance unconstitutional.

[18] Second, the fact that the statute does not require an intent on the part of the defendant to inflict torture or serious physical abuse upon the victim also does not broaden the scope of the (i)(5) aggravating circumstance so as to render it unconstitutional. We have repeatedly rejected this argument in the past, *see State v. Carter,* 988 S.W.2d 145, 150 (Tenn.1999); *State v. Blanton,* 975 S.W.2d 269, 281 (Tenn.1998); *see also State v. Odom,* 928 S.W.2d 18, 26 n. 5 (Tenn.1996), and we do so again today. Once again, we note that "[c]ircumstance (i)(5) does not require a mens rea. The aspect of torture focuses on the circumstances of the killing." *Carter,* 988 S.W.2d at 150.

The United States Supreme Court has never held that the "especially heinous, atrocious, or cruel" circumstance is unconstitutional in the absence of any mental requirement, and we conclude that the absence of a mental state does not render this circumstance constitutionally infirm in this state. Nothing in our statutes or cases, however, precludes consideration of the defendant's mental state in mitigation of sentence. In fact, Tennessee Code Annotated section 39-13-204(j)(9) specifically provides that the jury shall consider "[a]ny other mitigating factor which is raised by ***212** the evidence produced by either the prosecution or defense at either the guilt or sentencing hearing." This broad catch-all provision necessarily includes consideration of the defendant's mens rea at the time the victim is tortured or receives serious physical abuse beyond that necessary to produce death. *Cf. State v. Zaragoza,* 135 Ariz. 63, 659 P.2d 22, 27 (1983). In addition, before a jury may impose death, it must conclude that the aggravating circumstance or circumstances outweigh any mitigating circumstances beyond a reasonable doubt. Tenn.Code Ann. § 39-13-204(g)(1). This calculus also necessarily includes consideration of the circumstances of the offense and the defendant's mental state at the time he or she inflicts torture or serious physical abuse upon the victim. Accordingly, the fact that a mental state is absent from the "especially heinous, atrocious, or cruel" aggravating circumstance does not render this circumstance constitutionally infirm.

[19] Finally, we reject the contention that allowing a jury to use its common sense, knowledge, and experience somehow renders the (i)(5) aggravating circumstance constitutionally infirm. As the United States Supreme Court has noted, this aggravating circumstance "is not susceptible to mathematical precision," *Walton,* 497 U.S. at 655, 110 S.Ct. 3047, and so long as the jury is given some meaningful guidance in the sentencing process, it is anomalous to conclude that the jury cannot then reach its final determination through the use of its collective knowledge, experience, and common sense. (FN3) If the appellant did not wish to have a jury use its collective knowledge and common sense to determine an appropriate sentence in his case, we observe that procedures were available for him to request sentencing without a jury. *See* Tenn.Code Ann. § 39-13-205(b). A jury's ability to use its collective knowledge, experience, and common sense to assist in reaching a determination in these weighty and complex matters is the very strength of the jury system, not evidence of its frailty or unconstitutionality.

In summary, we hold that a rational jury could have found the (i)(5) aggravating circumstance beyond a reasonable doubt. The evidence was more than sufficient to establish that the murder was "especially heinous, atrocious, or cruel" in that it involved both torture and serious physical abuse beyond that necessary to produce death. Further, the trial court was not required to give an additional unanimity instruction as to the particular theory supporting this aggravating circumstance, because its general unanimity instruction with regard to the aggravating circumstances as a whole was adequate. Finally, interpretations of this Court have not expanded the meaning of the (i)(5) aggravating circumstance beyond constitutional bounds. We affirm the application of this aggravating circumstance to the appellant's case.

C. Review of the Weighing of the Aggravating and Mitigating Circumstances

[20] Having determined that a rational jury could have found the presence of two statutory aggravating circumstances beyond a reasonable doubt, we now undertake to determine whether the evidence supports the jury's finding that these aggravating ***213** circumstances outweigh any mitigating circumstances beyond a reasonable doubt. The jury did not indicate which, if any, of the fifteen mitigating circumstances submitted by the trial court was properly supported by the evidence, but in undertaking this analysis, we will presume that the jury found all fifteen mitigating circumstances were raised and supported by at least some evidence.

Nevertheless, based upon our own review, we conclude that the jury could have rationally concluded that the two aggravating circumstances outweighed any mitigating circumstances beyond a reasonable doubt. Both aggravating circumstances were clearly present beyond a reasonable doubt and were properly considered by the jury. The evidence shows that the appellant secreted the victim away by driving her to a discrete and remote location. The appellant then violently raped and assaulted the victim, while manually strangling her with such force as to render her unconscious. Although the appellant argued that he was under extreme mental stress during his gruesome crime, the testimony of Mr. Wilson and others to the effect that the appellant appeared to be acting "normally" both before and after the murder, certainly weighs heavily against his position. Further, we are unable to say that the jury improperly weighed any evidence concerning the appellant's unfortunate childhood--or that it improperly weighed any evidence of depression, post-traumatic stress disorder, or attention deficit disorder--as there was

CERTIFICATE & SEAL

STATE OF TENNESSEE

COUNTY OF MADISON

I, Judy Barnhill, Clerk of the Circuit Court for the County of Madison, in the State aforesaid, do certify that the foregoing is a correct transcript of the record and proceedings had in said Court in the case heretofore prosecuted and determined therein between **JON HALL** APPELLANT **and STATE OF TENNESSEE,** APPELLEE, as the same remains of record in said Court.

STATE OF TENNESSEE

COUNTY OF MADISON

In testimony whereof, I subscribe my name and affix the seal of said Court at office, in Jackson, Tennessee the **21ST** DAY OF **JULY** in the year Two Thousand Three in the 224th year of American Independence.

Judy Barnhill
JUDY BARNHILL, CLERK